

100 WORD ARTICLE ABSTRACT

LOST IN THE SHUFFLE: STATE-RECOGNIZED TRIBES AND THE TRIBAL GAMING INDUSTRY

This article presents the emerging argument that Native American tribes that have received state but not federal recognition have a legal right to engage in gaming under state law. This argument is based on five points: that 1) the regulation of gaming is generally a state right; 2) state tribes are sovereign governments with the right to game, except as preempted by the federal government; 3) federal law does not preempt gaming by state tribes; 4) state tribal gaming does not violate Equal Protection guarantees; and 5) significant policy arguments weigh in favor of gaming by state tribes under state law.

LOST IN THE SHUFFLE:
STATE-RECOGNIZED TRIBES & THE TRIBAL GAMING INDUSTRY¹

By Alexa Koenig² and Jonathan Stein³

“Perhaps the most basic principle of all Indian law ... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. ... What is not expressly limited remains within the domain of tribal sovereignty.”⁴

¹ The authors thank the University of San Francisco School of Law, Professor Peter Jan Honigsberg, and Sangeeta Puri, U.S.F. School of Law Class of 2007, for their assistance with this article.

² Alexa Koenig is an instructor and adjunct professor at the University of San Francisco School of Law. She earned her B.A. *summa cum laude* from the University of California, Los Angeles and her J.D. *magna cum laude* from the University of San Francisco, where she was managing editor of the U.S.F. Law Review. Ms. Koenig’s private practice focuses on public interest, intellectual property, and tribal law.

³ Jonathan Stein is a trial lawyer in Santa Monica, California. His record in litigation in the past 13 years is 42 wins and 5 losses. Mr. Stein graduated Harvard College *magna cum laude* in 1979, and University of Pennsylvania Law School in 1983, where he was an editor of vols. 130 and 131 of the University of Pennsylvania Law Review. Before beginning his own practice in 1992, Mr. Stein was associated with the New York office of Morgan, Lewis & Bockius, the Los Angeles office of Hughes, Hubbard & Reed, and the Los Angeles office of Brobeck, Phleger & Harrison.

⁴ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (U.S. Gov’t Printing Office 1945).

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I. Introduction

Federal recognition of Native American tribes, and the rights that attend such recognition, have rarely been the subject of such widespread interest as they are today. Tribes are redefining their place in society based on the influx of money and power that has come with tribal gaming – a right currently exercised only by federally recognized tribes. In just 16 years, the tribal gaming industry has grown from \$100 million to more than \$15 billion.⁵ According to one recent report, tribal gaming generated a staggering \$18.5 billion dollars in 2004 alone.⁶ But what gaming rights may be exercised by state-recognized tribes?

There is a subset of America's tribal population whose rights have been largely overlooked. That subset consists of Indian tribes that have been subjugated -- but never officially recognized -- by the federal government. So obvious has been their continued existence, however, that the states in which they reside have officially recognized them as sovereign governments that continue to this day.

This category of Native America's organized political tribal groups – “state recognized tribes”⁷ -- occupies an even less understood legal status than their federally-recognized counterparts.

⁵ See, e.g., U.S. Dept. of Justice, Federal Bureau of Investigation Press Release (June 30, 2004).

⁶ See National Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2004* at 2, available at <http://www.indiangaming.org> (last visited June 10, 2005). See also Doug Abrams, *State's Indian Casinos Earn \$4.2 Billion*, THE DESERT SUN (July 7, 2004) (reporting the findings of the Meister Report as written by Alan Meister for Analysis Group; this report noted that in 2003, tribal gaming generated \$4.2 billion in California alone, and \$16 billion nationwide).

⁷ Tribes that have achieved formal federal recognition are also recognized by the states in which they reside, and therefore are also “state recognized.” However, for the sake of clarity, we refer to tribes that have not received formal federal recognition as “state recognized” or “state tribes,” and

State-recognized tribes face an inconsistent and uncertain scope of powers that varies dramatically between states. Today, thirteen states – Alabama, California, Connecticut, Georgia, Louisiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oklahoma and Virginia⁸ -- recognize Indian tribes not acknowledged by the federal government.

In this article, we present the emerging argument that state-recognized tribes – like those with formal federal recognition – have a legal right to engage in gaming under state law. We also profile two state-recognized tribes – the Gabrielino-Tongva of California and the Shinnecock Indian Nation of New York – to showcase the historical similarities between federal and state tribes, and illustrate the inequities involved in preventing state tribes from opening casinos of their own.

Tribal-state relations have been contentious for centuries, as tribal and non-tribal populations conflicted over resources held by tribes but desired by the general population, such as land and other natural resources. Accordingly, most federal tribal law is built on the premise that state governments and tribes oppose one another and the federal government must protect Indians from the depredations of state governments and the general populace.⁹ Today, a new model is

those that have achieved the additional level of federal recognition as “federally recognized” or “federal tribes.”

⁸ This list was compiled through online and statutory research, as well as a series of phone interviews with state organizations responsible for coordinating tribal interaction with their respective state.

⁹ For example, the Indian Nonintercourse Act, 25 U.S.C. § 177, gave the federal government exclusive authority over the disposition of all tribal lands, in order to provide oversight of land transfers by Native American political groups. It was specifically passed to protect tribes from the predatory efforts of states and other entities that took advantage of tribal poverty to extract from Indian tribes valuable tribal lands at cheap prices. *See* 41 Am. Jur. 2d *Indians* § 112 (2004).

forming, as state and tribal governments realize the mutual economic and social benefits that can emerge from tribal gaming. When states and state tribes want to work together, such federal “protection” becomes not only unnecessary, it can hinder the very rights the federal government purportedly wishes to protect.

The argument that state-recognized tribes should be able to game under state law also reflects broad principles of federalism: can the federal government limit the political rights of tribes that it does not acknowledge, especially in an area such as gaming, which has traditionally been subject to state control? Should states have the right to compact with tribes that the state recognizes as government entities, based upon state and tribal sovereignty alone? Beneath these themes also lie fundamental notions of civil and natural rights: when the system of federal recognition takes decades to complete, should non-federally recognized tribal governments be required to forego much needed economic opportunities for their members?

The history of Indian gaming is already well documented, and is better sought in the sources upon which this article builds.¹⁰ Instead, Section II of this article briefly reviews the well-documented history of two state-recognized tribes – the Gabrielino-Tongva Tribe of California and the Shinnecock Tribe of New York – to provide context for our arguments. As these profiles make

¹⁰ For a general overview of the history of tribal gaming, see Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 N.V.L.J. 285, 287 (2004) (explaining that Indian gaming originated with bingo operations in California and Florida in the 1970s). For a more detailed overview of how Indian gaming evolved in California, see, e.g., *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 981 P.2d 990 (Cal. 1999); K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Initiative*, 36 U.S.F. L. REV. 1033 (2002); and Michael Lombardi, *Long Road Traveled III: California Indian Self Reliance and the Battle for 1A*, <http://www.cniga.com/facts/history.php> (last visited July 28, 2005).

clear, the histories of state tribes are often no less documented or legitimate than those of their federally recognized counterparts, even though these two tribes continue to be denied recognition as sovereigns by the United States. Absent federal acknowledgment and the political rights acknowledgement bestows, such state tribes are unnecessarily held back from providing a better life for the members of their tribal governments.

In Section III, we present a five-part argument in support of state tribal gaming. We explain that 1) the regulation of gaming is generally a state right; 2) state tribes are sovereign governments with the right to game, except as preempted by the federal government; 3) federal law does not preempt gaming by state tribes and so states have the intrinsic power to enter into gaming compacts with the state tribes they recognize; 4) state tribal gaming does not violate Equal Protection guarantees, much as gaming by federally recognized tribes complies with 14th Amendment mandates; and 5) significant policy arguments weigh in favor of permitting gaming by state tribes under state law.¹¹

II. The Histories Behind Two State-Recognized Tribes Demonstrate the Arbitrariness of Federal Recognition

A. The State Recognized Gabrielino-Tongva Tribe of the Los Angeles Basin

Of the tribes that have never been granted formal federal recognition, the Gabrielino-Tongva Tribe, which was recognized by California in 1994, is one of the best documented. The Gabrielinos once occupied villages from Topanga Canyon in Malibu south to the Newport Beach estuary, and inland to just shy of the city of San Bernardino.¹² Over 2,800 archeological sites, state and federal

¹¹ This article does not reach or otherwise consider the parallel argument that state tribes may conduct gaming based solely upon their limited but inherent sovereign powers.

¹² According to Thomas Blackburn, “The territory once occupied by the wider Gabrielino group included the greater portion of Los Angeles county, half of Orange County, parts of San Bernardino

historical records, and Catholic Church records confirm the tribe's history in the Los Angeles basin.¹³ The BIA identified and registered hundreds of members of the Gabrielino-Tongva Tribe in the published California Indian Rolls of 1928, 1950 and 1972. Additionally, "blood quantum certificates" have been awarded to two more generations of children, many of whom are now adult members of the 900-member tribe.

Physical evidence of Gabrielino-Tongva culture in Los Angeles is widespread: the State of California has registered an historical site in West Los Angeles where Tongva tribal members shared spiritual natural groundwater springs in 1770 with one of the two expeditions that led to the founding of the City of Los Angeles.¹⁴ Loyola Marymount University dedicated a garden to Tongva history in 2000, and its main university library permanently exhibits artifacts from Tongva village sites unearthed during campus construction. Other historic sites have been uncovered at Cal State Long Beach, the Sheldon Reservoir in Pasadena, the Los Encinos State Historical Park in Encino, and most recently by ongoing construction at the City of Los Angeles megaproject, Playa Vista.¹⁵

and Riverside Counties, and the islands of Santa Catalina, San Clemente, and probably San Nicolas." Thomas Blackburn, *ETHNOHISTORIC DESCRIPTIONS OF GABRIELINO MATERIAL CULTURE* 8-9 (University of California Los Angeles, 1963).

¹³ See THOMAS BLACKBURN, *ETHNOHISTORIC DESCRIPTIONS OF GABRIELINO MATERIAL CULTURE* (University of California Los Angeles, 1963).

¹⁴ See California Office of Historic Preservation, http://ohp.parks.ca.gov/default.asp?page_id=21427 (last visited August 3, 2005) (describing site number 522, "Serra Springs").

¹⁵ See Cecilia Rasmussen, *LA Scene: Southern California Then and Now*, LOS ANGELES TIMES, Feb. 28, 1994, at B3. See also Cal State University Long Beach, *About Puvunga: Background on Puvunga and the Sacred Site Struggle*, at http://www.csulb.edu/~eruy/puvudoc_0000_about.html

The tribe's unfortunate relationship with the United States is equally well documented, despite the tribe's lack of federal status. After California gained statehood in 1845, the 1848 Gold Rush and the explosion of non-native and non-Spanish populations created an immediate desire to define and delimit aboriginal rights. In 1851-52, President Millard Fillmore appointed three U.S. Government Treaty Commissioners to quickly sign 18 federal treaties with California tribes, including the Gabrielino-Tongva. The treaties were intended to reserve 8.5 million acres of reservation land for California Indian tribes, in exchange for the Indians' quitclaim of aboriginal title to a total of 75 million acres of California land. The reservation promised in the Gabrielino's treaty included tens of thousands of acres known as the San Sebastian Reserve at the Tejon Pass at the edge of modern Los Angeles County.¹⁶ The federal government and its 18 treaties sought to bring order and protection, no matter how minimal, to the Native American populations pressed by the rapid disappearance of the California frontier. However, after lobbying by California business interests, the United States Senate refused to ratify any of the 18 treaties, and instead placed an "injunction of secrecy" on their existence. After the Gabrielino treaty failed ratification, the San Sebastian reserve was illicitly transferred and became the personal property of the Superintendent of Indian Affairs, Edward Beale, who renamed the property "Tejon Ranch." Today, Tejon Ranch is one of the largest private land holdings in California.¹⁷

(last visited April 2, 2004); Nick Madigan, *Developer Unearths Burial Ground and Stirs Up Anger Among Indians*, NEW YORK TIMES, June 2, 2004, at A13.

¹⁶ San Sebastian was a 75,000-acre reservation to which a number of Gabrielino families were relocated. For more information on San Sebastian Reserve, *see* <http://www.frazmtn.com/~rrchs/tejonie.html> (last visited July 28, 2005).

¹⁷ *See id.*

The 18 “lost treaties” were ultimately discovered in a locked desk drawer in the Senate Archives in 1905.¹⁸ Upon their discovery, a series of flawed legal efforts were made over the next seven decades to redress the Gabrielino-Tongva Tribe’s subjugation. Treatyless, and now landless, the Tribe was never subsequently acknowledged by the United States, despite the unofficial recognition of their tribal status through the treaty-making that was authorized by President Millard Fillmore in 1851.

One such effort to address the tribe’s plight was passage of the California Jurisdiction Act of 1928.¹⁹ The Jurisdiction Act authorized the California Attorney General to represent “landless Indians,” to gain compensation for their unresolved equitable and land claims in the U.S. Court of Claims. However, two salient characteristics doomed the effectiveness of the land claims settlement effort. First, no land claims settlement was offered to the tribe itself, but only to individual tribal members and their descendants, who were deemed “landless Indians.” And second, money and *not* land was offered, avoiding the ticklish question of federal status and acknowledgment of the treatyless tribe.²⁰

¹⁸ See Previous Recognition by the United States Government of the Tsungwe Tribe, *available at* <http://www.dcn.davis.ca/us~ammon/tsungwe/treaties.html> (last visited July 27, 2005). Because of these and similar violations of established treaties, California Indians now own less than one-fifth of the land on a per capita basis of tribal members in other states. See Koenig, *supra* note 11, at 1052 n.141 (citing *California Indians Past and Present*, Alliance of California Tribes Website, <http://www.allianceofcatribes.org/californiaindians.htm>).

¹⁹ 45 Stat. 602 (May 18, 1928), *as amended* 46 Stat. 259 (April 29, 1930).

²⁰ See *id.*

Fourteen years later, in *California Indians v. United States*,²¹ the federal court recognized the arguments of the young California Attorney General Earl Warren that “a promise [was] made to these tribes and bands of Indians and accepted by them but ... was never fulfilled.”²² Acting to recognize the equitable claims of the Gabrielinos and “all the Indians of California,” the Court awarded seven cents an acre as compensation to individual “landless Indians” for the 8.5 million acres of reservation lands that were to be set aside for federal Indian reservations under the 18 lost treaties. At the time of the treaties’ making, some 94 years earlier, no public lands had been purchased by the United States for less than \$1 per acre – fourteen *times* what was ultimately awarded. No compensation was attempted for the 75 million acres of California land actually taken from California Indian tribes, other than payment for the 8.5 million acres of reservation lands, and no federal acknowledgment was given to the Indian tribes who had signed the 18 lost treaties. The court awarded no interest for the 94-year period between signature of the 1851-52 treaties and 1944, but did deduct the costs of administration from the award given.²³

After WWII reminded the public of the sacrifices of Native American soldiers, the 1944 settlement amount was recognized as inadequate and a second effort to settle land claims began. Congress established the Indian Claims Commission, which was empowered to hear a broad range of claims by landless Indians against the United States, including claims for the United States taking aboriginal title to lands.²⁴ In addition, \$10,000 of the “Indians of California” funds in the United States Treasury was authorized for services to be rendered by an attorney in accordance with any

²¹ *Indians of California v. United States*, 98 Ct. Cl. 583 (1942).

²² *Id.*

²³ *See id.*

²⁴ 25 U.S.C. § 70.

contract of employment which might be approved by the Secretary of the Interior.²⁵ The Gabrielino-Tongva and other Southern California tribes filed a land claim suit before the Indian Claims Commission, known as Docket 80. The Southern California tribes were known as “Mission Band Indians,”²⁶ because of their prior enslavement by the Spanish to build the historic Catholic missions of Southern California. The Mission Band Indians were a separate classification from the “Indians of California,” and were comprised of survivors of the 47 bands of Gabrielino, Diegueno, Luiseno, Serrano, and Juaneno tribes of Mission Indians.²⁷

After years of pursuing their case in the Indian Claims Commission, the Mission Indians received an offer for an out-of-court settlement made by the United States to all California Indians, including the Mission Band Indians.²⁸ The land claims settlement awarded \$633 to each federally-registered member of the Gabrielino Tribe, which amount was paid in 1972, some 121 years after the Gabrielino-Tongva Tribe signed their treaty. However, no attempt was made to consider or resolve the federal status or the land claims of the Gabrielino-Tongva Tribe itself.

The failure of the 1946 Indian Claims Commission to adequately address the tribe’s sovereign status or to settle the tribe’s land claims may be explained, in part, as a long-lasting by-product of the Eisenhower Administration’s “assimilation policy,” expressed legislatively as House Concurrent Resolution 108 of 1953. Under this policy, the United States Government terminated 53 federal Indian rancherias in California and dissolved the previously recognized tribal sovereigns.

²⁵ 60 Stat. 348, 361 (1946).

²⁶ *Baron Long (El Capitan) and other Bands of Mission Indians of California v. United States*, 122 Ct. Cls. 419 (1952).

²⁷ *Id.*

²⁸ See Florence C. Shipek, *Mission Indians and Indians of California Land Claims*, AMERICAN INDIAN QUARTERLY 409, 417 (1989).

The tribal members were paid cash and otherwise encouraged to “assimilate,” as if they were part of an amorphous immigrant group rather than a subjugated tribal sovereign. Notably, the Gabrielino’s settlement and the “assimilation policy” were both administered by Commissioner of Indian Affairs Dillon S. Myer, who had previously served as chief administrator of the Japanese internment camps in California.²⁹ In 1983, the unlawfulness of the Eisenhower “assimilation policy” was recognized by the federal government, which stipulated in *Hardwick v. United States* to reinstate federal acknowledgment to 14 terminated tribes.³⁰ Unfortunately, because the Gabrielino-Tongva Tribe was not a terminated rancheria tribe, the reversal of the assimilation policy provided no remedy to the Gabrielino-Tongva Tribe.

Today, however, the tribe and its 900 members continue as a political group, thanks in part to the State of California. California officially recognized the Gabrielino-Tongva as a California Indian tribe in Joint Resolution Number 96, Chapter 146 of the Statutes of 1994. The resolution made the Gabrielino-Tongva tribe one of only two non-federal tribes recognized by the state.³¹ The Resolution reads:

Be it ... Resolved by the Assembly and Senate of the State of California, Jointly, that the State of California recognizes the Gabrielinos as the aboriginal tribe of the Los Angeles Basin and takes great pride in recognizing

²⁹ See, e.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221-222 (1986) (explaining that Meyer was in charge of the federal government’s overall termination plan).

³⁰ Civil No. 79-1710 (N.D. Cal. 1983), available at <http://sorrel.humboldt.edu/~nasp/hardwick.html> (last visited June 8, 2005).

³¹ The Juanenos Tribe of Orange County has also received state recognition. See Cal. Jt. Res. 48, Chapter 121, 1993-1994 Leg. Sess. (Sept. 22, 1993).

the Indian inhabitation of the Los Angeles Basin and the continued existence of the Indian community within our state.³²

Despite the tribe's state recognition, despite its well-documented history of physical evidence in the Los Angeles Basin, and despite its equally well-documented history of interaction with the United States, the federal government has yet to formally "acknowledge" the Gabrielino-Tongva as an Indian tribe. The Gabrielino-Tongva's lack of federal status prevents the tribe from acquiring federal rights or assistance granted to 109 other California Indian tribes, many of which share a similar history.³³ The tribe began the formal federal recognition process in 1994, but like the hundreds of other tribes waiting for federal acknowledgment, resolution of their federal status is still years, if not decades away, due to the time that it takes to satisfy all of the BIA's requirements for federal recognition, and because the BIA generally only resolves two petitions for recognition a year.

Today, the Gabrielino-Tongva Tribe hopes to establish tribal gaming under state law. The tribe is taking a cooperative approach to gain the right to engage in tribal gaming to generate revenue to support its tribal government and its 900 tribal members. The tribe hopes to establish a cultural museum and catacomb to preserve the many archaeological and human remains now owned by the tribe, and to bring much needed jobs and increased tourism to Los Angeles County. A recent economic report estimates that 47,200 jobs would be created by the Tongva Casino & Resort, and over \$4.2 billion in new economic activity would be generated in Los Angeles County, including \$3

³² Cal. Jt. Res. 96, Chapter 146, 1993-1994 Leg. Sess. (1994).

³³ California's tribes have had an especially difficult time: "[A]lthough California Indians make up twelve percent of Indians nationwide, they receive less than one percent of all federal general assistance funds." Koenig, *supra* note 11, at 1033 n.6; *see also California Indians Past and Present*, Alliance of California Tribes Website, at <http://www.allianceofcatribes.org/californiaindians.htm> (last visited August 13, 2004).

billion from increased tourism alone. This new economic activity, and the tribe's willingness to share 20% of their net gaming revenue, is estimated to generate as much as \$687 million annually to federal state, county and local government revenues in the first year alone.³⁴ These financial contributions and the tribe's legal, historical and equitable arguments have earned the support of a diverse coalition of business, labor and minority groups interested in improving the Los Angeles County economy, and especially its tourist industry.³⁵

B. The State-Recognized Shinnecock Indian Nation of New York

Unlike the landless Gabrielino-Tongva, the 1300-member Shinnecock Indian Nation of New York has managed to retain approximately 1200 acres of their original lands in the form of a state-recognized reservation near the east end of Long Island.³⁶ However, even this acreage represents a significant loss over lands the tribal nation once governed; in 1703, the tribe had exclusive control over approximately 3600 acres secured through a 1,000 year lease with New York state. That

³⁴ See Alan Meister, The Analysis Group, *The Potential Economic and Fiscal Impact of the Proposed Gabrielino Casino Resort on Los Angeles*, July 8, 2005 (report on file with the authors).

³⁵ The significant economic and social benefits that can be generated from urban gaming are evident in Michigan, where Proposition E (a 1996 referendum that authorized the creation of three Class III casinos in Detroit, an historically black city with a high poverty rate) helped revitalize the local economy. For information on the history of Proposition E, see, e.g., *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876, 878 (6th Cir. 2002). See also Michigan Gaming Control and Revenue Act, Mich. Comp. Laws § 432.201 *et seq* (1996) (which interpreted and expanded upon Proposition E).

³⁶ See *Shinnecock Indian Nation History*, Shinnecock Indian Nation Website, <http://www.shinnecocknation.com/history.asp> (last visited July 14, 2005).

holding dwindled to a mere 800 acre reservation in 1859 in a largely one-sided, state friendly deal designed to extend the Long Island Rail Road through the tribe's property.³⁷

As noted by the tribe, it is "among the oldest self-governing tribes of Indians in the United States."³⁸ However, despite its more than 200 years of official recognition by the state of New York, almost 400 years of contact with white settlers, and thousands of years in the greater New York area,³⁹ the tribe has yet to be recognized by the United States federal government. The tribe first applied for formal recognition with the BIA in 1978; more than 25 years have already passed without resolution.⁴⁰

Over the last several decades, the tribe has undertaken several forms of economic development to provide for its continued governance and the prosperity of its people. However, long term efforts to lease land to nearby farmers have been hampered by serious pesticide leakage, which severely polluted the tribe's drinking water. A shell fish hatchery, which took advantage of

³⁷ See *Community Profile: Shinnecock Reservation*, NEWSDAY, <http://www.newsday.com/extras/lihistory/spectown/hist008f.htm> (last visited August 9, 2004). See also Michael Powell, *Old Money and Old Grievances Clash in Haven of the Very Rich; Tribe's Lawsuit Seeks Return of 3,600 Acres of Prime Long Island Land*, THE WASHINGTON POST, June 25, 2005.

³⁸ *Shinnecock Indian Nation History*, Shinnecock Indian Nation Website, <http://www.shinnecocknation.com/history.asp> (last visited July 14, 2005).

³⁹ See *Shinnecock*, ENCYCLOPEDIA OF NORTH AMERICAN INDIANS (Houghton Mifflin), http://college.hmco.com/history/readerscomp/naind/html/na_035800_shinnecock.htm (last visited August 9, 2004).

⁴⁰ See *Shinnecock Indian Nation History*, Shinnecock Indian Nation Website, <http://www.shinnecocknation.com/history.asp> (last visited July 14, 2005).

the tribe's coastal location, also had to be terminated due to pollution. An annual powwow is now the tribe's greatest money maker, but even that has proven inconsistent thanks to uncertain weather; even in good years, income from the powwow must be supplemented through state grants.⁴¹

Consequently, the tribe is working to secure the right to open a casino to generate the funds needed to help their government and members thrive.⁴² As one of the biggest proponents of gaming by state recognized tribes, the tribe is currently involved in extensive litigation to determine whether it has the right to open a casino on its tribal lands, despite its lack of federal recognition.⁴³ At least one federal judge appears to have sympathized with the tribe's frustration at its lack of federal recognition and inability to game without it. In *New York v. Shinnecock Indian Nation*,⁴⁴ the United States was ordered to appear as a "involuntary plaintiff," which would have effectively made the

⁴¹ See *Shinnecock*, ENCYCLOPEDIA OF NORTH AMERICAN INDIANS (Houghton Mifflin), http://college.hmco.com/history/readerscomp/naind/html/na_035800_shinnecock.htm (last visited July 14, 2005).

⁴² See *Shinnecock Indian Nation History*, Shinnecock Indian Nation Website, <http://www.shinnecocknation.com/history.asp> (last visited July 14, 2005). See also Bruce Lambert, *Shinnecock Tribe Plans Suit, Claiming Land in Hamptons*, THE NEW YORK TIMES (June 12, 2005).

⁴³ See *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003); see also Shinnecock Indian Nation Website, <http://www.shinnecocknation.com> (last visited July 14, 2005). Another vocal proponent of state tribal gaming is the state recognized Unkechaug Nation, which has also been trying to open a casino without federal recognition. See, e.g., *Carruthers v. Flaum*, 365 F. Supp. 2d 449 (S.D.N.Y. 2005); Steve Israel, *Unkechaug Nation buys land near Kutsher's*, TIMES HERALD-RECORD, <http://www.recordonline.com/archive/2004/06/15/index.html> (last visited July 14, 2005).

⁴⁴ 280 F. Supp. 2d (E.D.N.Y. 2003).

court's orders binding upon the federal government. Judge Platt suggested he might eventually require the United States to formally recognize the Shinnecock tribe.⁴⁵

Although the court eventually dismissed the United States with prejudice, the tribe's case continues. In the meantime, the Shinnecock have pursued a different route than the Gabrielino tribe, no longer passively sitting back and waiting out the legal process. Instead, the tribe has taken controversial first steps towards opening a casino without having secured federal recognition, including preparing a site for casino construction.⁴⁶ Most recently, the tribe has demonstrated its frustration with the lack of recognition of its gaming rights by commencing a spectacular lawsuit claiming up to \$150 billion dollars of "back rent" for current and past use of aboriginal land in the Hamptons. The tribe has offered to abandon the lawsuit in exchange for recognition of its right to open a casino.⁴⁷

III. States and State-Recognized Tribes Have the Authority To Enter Into Gaming Compacts Outside of IGRA

⁴⁵ See Ann Givens, *Shinnecock Case Could Set National Precedent*, NEWSDAY (Jan. 26, 2004), available at <http://www.shinnecocknation.com/news/news74.aspx> (last visited March 22, 2004) (discussing the potential role of the judiciary in the federal recognition process of the Shinnecock Tribe); see also Michael Colello, *Shinnecock Trial Begins in Spring*, THE EAST HAMPTON INDEPENDENT (Jan. 27, 2004), available at <http://www.shinnecocknation.com/news/news75.aspx> (last visited March 22, 2004) (noting a trial may decide whether the tribe should be granted federal recognition status).

⁴⁶ See Lambert, *supra* n. 41.

⁴⁷ See Powell, *supra* n. 36; see also *Nation in Brief*, THE WASHINGTON POST, June 16, 2005, at A30 (noting the tribe is "seeking billions of dollars for 150 years' worth of back rent on land it inhabited for 12,000 years in New York state in one of the largest lawsuits of its kind").

The conclusion that state recognized tribes such as the Gabrielino-Tongva Tribe and the Shinnecock Indian Nation may engage in gaming under state law is built from traditional theories of tribal political rights and the constitutional sovereignty of the states which recognize them. Our conclusion is based on five points, explained in this Section III:

1) While the federal government generally has jurisdiction over tribal practices that impact non-tribal populations, gaming is a “vice activity,” a private liberty right regulated pursuant to state authority under the 10th Amendment. “Vice activities” such as gaming fall within the constitutional purview of state authority in the federalist system, and so only where the federal government has preempted the field will the regulation of gaming fall under federal authority.

2) State recognized tribes are sovereign governments with limited but inherent sovereign powers, including the right to conduct gaming activities, except as regulated as a “vice activity” by the state or as preempted by the federal government. Alternatively stated, state tribes enjoy the same private liberty rights to conduct gaming as other state citizens, subject to state or federal regulation.

3) According to a growing line of federal case law, the Indian Gaming Regulatory Act (“IGRA”)⁴⁸ only preempts the field of gaming by federally recognized tribes on federal “Indian land.” Gaming by state tribes, by other state-authorized parties, and even by federally-recognized tribes that is not conducted on federal “Indian lands,” is not reached by IGRA. Thus gaming by a state tribe on state-dominion land, such as a state Indian reservation, remains within the constitutional purview of state authority. As a result, state-recognized tribes may conduct gaming activities pursuant to state law.

⁴⁸ 25 U.S.C. §§ 2701 *et seq.*

4) Gaming by state-recognized tribes does not violate equal protection laws that forbid state governments from discriminating in favor of one racial group, because like federal tribes, state tribes are political entities and not racially-defined.

5) Significant policy arguments, consistent with IGRA policies to support the economic well-being of federal tribes, also support gaming by state-recognized tribes.

Opponents of state tribal gaming may argue that 1) federal law preempts the field of Indian gaming in its entirety, whether or not the federal government recognizes the Indian tribe in question; 2) federal law only permits gaming by federally recognized tribes, and state-recognized tribes have no inherent right to conduct gaming in the absence of federal authority granting gaming rights; and 3) allowing state recognized tribes to conduct gaming to the exclusion of the general population violates equal protection mandates, by granting a “race-based” preference to a Native American racial or ethnic group.⁴⁹

As explained below, while federal law does preempt the field of tribal gaming by federally-recognized tribes – those tribes that the federal government recognizes as subjugated tribal sovereigns and whose gaming IGRA was designed to regulate and foster -- federal law does not preempt gaming by state-recognized tribes. Additionally, gaming by state recognized tribes does not violate equal protection guarantees, because such gaming is permissibly based on a state-recognized tribe’s status as a state-recognized sovereign government – *not* the race or ethnicity of the tribe or its individual members. As a result, states and the tribal sovereigns they recognize have the right to enter into mutually beneficial agreements to allow for tribal gaming in accordance with state law.

⁴⁹ These arguments are those which have been raised during the authors’ work advocating on behalf of state-recognized tribes.

A. *The Regulation of Gaming is Generally a State Power*

To understand “who has the right to do what,” it is important to understand the layers of state, tribal, and federal jurisdiction upon which current tribal gaming rights are built.

External tribal affairs – those which extend beyond tribes’ internal self-governing – are generally subject only to federal jurisdiction.⁵⁰ Consequently, states usually have no power to regulate activities which implicate tribes, without Congress’ express consent. It has been argued that this precludes states and state-recognized tribes from entering into gaming agreements, since Congress has not expressly provided for state tribal gaming agreements. However, this view may be too simplistic, and may place too severe a limit on state and tribal rights.

States have constitutional authority to regulate “vice activities” conducted on state land pursuant to powers reserved by the United States Constitution’s 10th Amendment.⁵¹ At the heart of this is a state’s power to regulate all forms of gambling that have not been expressly prohibited by the federal government. This state power has been repeatedly recognized.⁵² As recently stated by

⁵⁰ Please see Section III(B) for a discussion of the relationship between tribes and the federal government.

⁵¹ According to the 10th Amendment, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend X.

⁵² See, e.g., *Ah Sin v. Whitman*, 198 U.S. 500, 505-506 (1905) (“[t]he suppression of gambling is concededly within the police powers of a state, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation by a ‘clear, unmistakable infringement of rights secured [sic] by the fundamental law’”); *People v. Sullivan*, 60 Cal. App. 539 (4th Dist. 1943) (“[t]he Supreme Court of the United States recognizes the right of the State to prohibit or regulate gambling and other acts which may affect public morals”); *Maske v.*

the Ninth Circuit, “circuits ... have, by and large, held that the regulation of gambling lies at the heart of the state’s police power.”⁵³

The first layer of our analysis, then, recognizes that any commercial or tribal gaming conducted within state borders (as opposed to the borders of a federal Indian reservation) would be a “vice activity” generally regulated under state, and not federal, jurisdiction. One Eighth Circuit case recognized this power reserved to the states even applies to Indian gaming, if such gaming is conducted outside a federal Indian reservation, and on land subject to state dominion.⁵⁴ As we explain below, the states’ federalist authority to regulate vice activities extends not just to gaming by private parties operating on lands under state dominion, but to Indian tribes recognized by the state and operating on a state Indian reservation or on other state lands.

CONCLUSION ONE: Gaming is a “vice activity,” a private liberty right regulated pursuant to state authority under the 10th Amendment. “Vice activities” such as gaming fall within the constitutional purview of state authority in the federalist system, and so gaming conduct will fall under federal authority only where the federal government has expressly preempted the field.

State, 1 Mo. 452, *5 (1824) (“[i]t certainly will not be denied, that, under our federal system, each state has a right to regulate its own internal policy, on all subjects, when they are not limited by the Constitution of the United States”).

⁵³ *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 737 (9th Cir. 2003) [hereinafter *Artichoke Joe’s II*].

⁵⁴ *See State ex rel Nixon v. Coeur d’Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999) (noting that IGRA does not preempt all forms of tribal gaming, including off-reservation internet gaming conducted by an Indian tribe).

B. Tribes are Sovereign Governments with Inherent Rights Including the Right to Game, Except as Preempted by the Federal Government

Sovereign tribes generally have the power to regulate and engage in gaming within their borders, except as that right has been expressly preempted by the federal government.⁵⁵ The parameters of tribal jurisdiction over gaming activities, that is, the authority to conduct gaming activities unless otherwise prohibited by positive enactment, is the next layer of analysis. In particular, we must determine what gaming rights *state* tribes enjoy, absent federal preemption.

To do so, we begin by examining the powers of a sovereign tribe, whether or not it is federally acknowledged. Sovereignty is one of the most powerful concepts in Indian life and government, as well as Indian law. Black's Law Dictionary defines a "sovereign" as "[a] person, body or state vested with independent and supreme authority."⁵⁶ The dictionary further defines the term "sovereign state" as "[a] state that possesses an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is a subject."⁵⁷ A recent law review article describes sovereignty as "supreme legal authority."⁵⁸ While these definitions suggest that tribal sovereigns, like national sovereigns, should be able to do whatever they want within their borders, a tribe's sovereign relationship with the United States is more complex.

The United States holds dominion over all Indian tribes within its borders, because unlike sovereign nations, Indian tribes were conquered by the United States. At some point, directly or indirectly, all Indian tribes were subjugated by force of arms. As a result, as noted by the

⁵⁵ See, e.g., S. Rep. No. 446, at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-3076.

⁵⁶ BLACK'S LAW DICTIONARY 1401 (7th ed. 1999).

⁵⁷ *Id.*

⁵⁸ Peter d'Errico, *Sovereignty: A Brief History in the Context of U.S. "Indian Law,"* <http://www.umass.edu/legal/derrico/sovereignty.html> (last visited March 31, 2004).

preeminent tribal scholar Felix S. Cohen, tribal authority is not supreme, because tribal authority can be limited by federal law.⁵⁹

The next layer of our analysis must ask, then, in what ways has tribal sovereignty been subordinated by the federal government, and in what ways is that authority still supreme? What sovereign powers still exist, and which have been extinguished? The answers do not come from the literal language of the United States Constitution. The Constitution mentions Indian tribes only twice, once to exclude Indians from the per capita assessments used for attributing representatives and tax dollars,⁶⁰ and once to include commerce with Indian tribes within the federal Commerce Power.⁶¹ Rather, traditional and time-honored concepts of a limited tribal sovereignty arise from judicial interpretations of constitutional principles and principles of common law.

Judicial opinions repeatedly recognize the right of subordinate tribal sovereigns to govern their internal affairs. The United States Supreme Court first acknowledged that an Indian tribe possesses an inherent sovereign right to tribal self-government in an 1832 case involving the Cherokee Nation, *Worcester v. Georgia*.⁶² The Court held that the Cherokee Tribe possessed inherent or self-evident powers as the supreme governmental authority over its members, but that authority was necessarily limited by the Cherokee Nation's "dependency" on the United States. The Supreme Court found an historic harmony in the relationship between the tribe and the federal government, not dissimilar to the federalist model and its balancing of state and federal powers. *Worcester* recognized that sovereign powers of an Indian tribe were self-evident, arising from an Indian tribe's original status as a self-governing sovereign. Its sovereign powers were not granted

⁵⁹ See Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1945) (emphasis added).

⁶⁰ See U.S. CONST. art. I, § 2, cl. 3.

⁶¹ See U.S. CONST. art. I, § 8, cl. 3.

⁶² 31 U.S. 515, 581 (1832).

to it by external powers such as the federal government, or by the act of federal recognition, but were part natural law and part historical. Harmonizing with this chord of subjugated sovereignty, the Supreme Court found federal law formed a natural limitation to an Indian tribe's sphere of authority, by merit of its subjugation. The independent sovereign was now conquered, but still possessed those natural and historical powers of sovereignty which the conqueror had not confiscated. Over the next 170 years, additional judicial interpretations coalesced this notion of tribal sovereignty into three foundational principles:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe [p]ossesses, in the first [i]nstance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external [p]owers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its [p]owers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.⁶³

Thus, tribes have authority to do what they want on their tribal lands, including conduct gaming, except where those rights have been expressly subordinated to an active federal power. “[T]reaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers ... this is but an application of the general principle that ‘[I]t is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror.’”⁶⁴

Ultimately, the federal government, when it subordinated tribes directly or indirectly, only took certain rights and left other “sovereign rights” intact. In this sense, as one of the many beauties

⁶³ Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1945) (emphasis added).

⁶⁴ *Id.* at 122 (partially quoting *Wall v. Williamson*, 8 Ala. 48, 51 (1845)).

of the federalist system, tribal sovereigns are comparable to the 50 state sovereigns, whose inherent powers are reserved by the 10th Amendment. Judicial opinions have created a protective penumbra of case law around the notion of inherent, natural, historical or self-evident tribal sovereignty, albeit one more permeable to active federal enactment than state powers. Accordingly, Indian tribes today remain self-governed entities that retain all powers of governance, including the power to conduct or permit gaming activities within their sphere of operation, that have not been expressly preempted by Congress. Thus, gaming activities by Indian tribes fall within the limited sphere of supreme tribal authority, unless otherwise prohibited by a positive federal enactment.⁶⁵

The next layer of the analysis, then, must investigate whether this subordinate sovereign status applies equally to both federal and state tribes. In other words, while federal case law usually addresses the limited sovereign powers of Indian tribes that the federal government acknowledges, does it also protect Indian tribes that are recognized only by state governments? The answer must be yes. State tribes and federal tribes were both subjugated, directly or indirectly, by force of arms. Both were true sovereigns prior to that subjugation. Applying the three principles above, (1) a state tribe (like a federal tribe) initially possessed all the powers of any sovereign state; (2) conquest rendered the tribe subject to the legislative power of the United States, (3) making the state tribe's powers subject to qualification by treaties and by express legislation of Congress, but except as expressly qualified, full powers of internal sovereignty must still be vested in the state tribes and their duly constituted organs of government. Certainly in the case of the Gabriellino-Tongva, whose 1851 treaty was signed but never ratified, their inherent sovereignty was recognized by at least one President, helping to establish that the United States government acknowledged them as a bona fide tribe at one time.

⁶⁵ In this article, we do not consider the related issue of whether either state or federal tribes possess the right to conduct gaming without a state compact.

None of the three principles above suggest that federal recognition is a prerequisite to a tribe's inherent sovereignty.⁶⁶ Federal acknowledgment is one important way that the superior federal power has exercised its legislative power, but nothing in the Indian tribe's lack of federal status appears to dissolve this inherent, self-evident, natural and historical authority. This argument garners additional support from the preeminent tribal scholar, Felix S. Cohen: "From the earliest years of the Republic the Indian tribes have been recognized as 'distinct, independent, political communities,' and, as such, qualified to exercise powers of self-government, *not by virtue of any delegation of powers from the Federal Government, but rather by reason of their inherent tribal sovereignty.*"⁶⁷ Since such powers are not dependent on the federal government for their existence, state tribes such as the Gabrielinos and Shinnecocks must still be sovereign, irrespective of federal recognition. Treaties and legislation merely confirm sovereign status – they do not grant it. Federal recognition, as the name implies, is a *gestalt* reflection of the inherent power of state tribes; federal acknowledgement is not its creation, it is not its source.

Perhaps the most basic principle of all Indian law, supported by a host of decisions ... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation.⁶⁸

⁶⁶ *But see, e.g.,* New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003)

(suggesting that the BIA is in the best position to determine whether a tribe is, in fact, sovereign).

⁶⁷ *Id.* at 122 (1945) (emphasis added).

⁶⁸ *Id.*

Ultimately, then, since tribal sovereignty is inherent, self-evident, natural and historical, it is independent of the sanction of federal law, and continues to exist even in the absence of federal recognition.⁶⁹ Because state recognized tribes were subjugated just like federally recognized tribes, state recognized tribes must retain the same sovereign rights as those which are federally recognized. As demonstrated above, the inherent sovereign power includes the power to conduct vice activities such as gaming, except where the federal government has affirmatively provided otherwise. And for state tribes, within that sphere of tribal authority must lie the power to enter into an agreement with the state sovereign that recognizes the tribe, absent an express federal prohibition otherwise. As explained below, while IGRA was enacted by the federal government to place express limits on the gaming activities of *federal* tribes, federal law has not so limited this sovereign powers of state tribes.

CONCLUSION TWO: 2) State recognized tribes are sovereign governments with limited but inherent sovereign powers, including the right to conduct gaming activities, except as regulated as a “vice activity” by the state or preempted by the federal government.

C. The Federal Government Has Only Preempted the Field of Gaming By Federally Recognized Tribes, Not Gaming by State Citizens, State Corporations or State-Recognized Tribes

⁶⁹ *But see Carruthers v. Flaum*, 365 F.Supp.2d 448 (S.D.N.Y. 2005) (stating that because the Unkechaug tribe is only state recognized, and not federally recognized, the tribe is not sovereign).

The next layer of analysis addresses federal preemption. If state tribes, like federal tribes, hold inherent, self-evident, natural or historical sovereign powers to conduct gaming, we must look to where federal enactments limit tribal and state sovereignty.⁷⁰

Preemption is “[t]he principle ... that a federal law can supersede or supplant any inconsistent state law or regulation.”⁷¹ There are two federal acts that directly apply to federal tribes and so might be argued to preempt gaming by a state tribe: the *Indian Gaming Regulatory Act* (“IGRA”)⁷² and the federal *Johnson Act*.⁷³ As explained below, neither act applies to state tribes. Therefore neither act preempts gaming by a state tribe pursuant to a compact with its respective state.

1. The Cabazon Case

In 1987, the United States Supreme Court decided *California v. Cabazon Band of Mission Indians*,⁷⁴ which led to the creation of IGRA, and explained how preemption works in an Indian gaming setting. The *Cabazon* case concerned several federally recognized California tribes that were running bingo operations, even though California law prohibited such a “vice activity” within state borders. No federal enactment prevented gaming on federal Indian reservations, and the tribes were frustrated at the state’s insistence that state law applied to make gaming conducted on federal

⁷⁰ The related question of where a state tribe may conduct gaming activities is not broached. We assume that the state tribe will choose to conduct gaming activities with the express agreement of the state which recognizes it.

⁷¹ BLACK’S LAW DICTIONARY 1197 (7th ed. 1999).

⁷² 25 U.S.C. §§ 2701 *et seq.*

⁷³ 15 U.S.C. §§ 1171-1178.

⁷⁴ 480 U.S. 202, 222 (1987).

reservations unlawful.⁷⁵ The tribes argued that they had the sovereign power to conduct gaming on their sovereign lands, which were under federal and not state control; California argued the tribes' bingo operations illegally conflicted with the state's anti-gaming laws.⁷⁶

The U.S. Supreme Court ultimately found in favor of the tribes,⁷⁷ explaining that state law only applies on federal Indian reservations in certain circumstances.

[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. ... It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.⁷⁸

The Court concluded that gaming fell within the limited sphere of tribal sovereignty, and no positive federal enactments applied to limit the scope of Indian gaming. California's gaming laws could only be applied on lands under the dominion of California, not on federal Indian lands.⁷⁹

The *Cabazon* opinion also looked to see whether the state's jurisdiction over gaming had been preempted by federal law. It noted that "state authority is preempted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."⁸⁰ The court weighed the federal and tribal interests in encouraging tribal self-sufficiency and economic development and found that they were complimentary. However, the state's interest in regulating tribal gaming, illustrated by

⁷⁵ *Id.* at 204-206.

⁷⁶ *Id.*

⁷⁷ *Id.* at 207.

⁷⁸ *Id.*

⁷⁹ *See Cabazon*, 480 U.S. at 207-212.

⁸⁰ *Id.* at 216.

California's purported purpose to prevent organized crime from infiltrating tribal gaming operations, conflicted with federal and tribal interests. Because the federal interest in furthering tribes' economic well-being was paramount, the state law was preempted. Allowing state regulation to intrude, in this case, would be inconsistent with tribal and federal interests in tribal self-sufficiency, and thus was impermissible.⁸¹

Ultimately, *Cabazon* left two lasting contributions to the long line of judicial interpretations delimiting tribal sovereignty. First, it affirmed that in the absence of a positive federal enactment that says otherwise, tribal governments are the supreme authority to conduct and regulate gaming on Indian lands under their jurisdiction. *Cabazon* thus falls in line with traditional notions of tribal sovereignty as an inherent, self-evident, natural and historical power possessed by Indian tribes but limited by federal enactment. And second, *Cabazon* set forth a preemption analysis applicable to tribal gaming, becoming the first of several cases to apply federal preemption analysis to tribal gaming as a nexus where tribal, federal and state jurisdictions intersect.

2. *Indian Gaming Regulatory Act of 1988 ("IGRA")*

After the *Cabazon* case was published, the absence of state authority on federal Indian reservations terrified and infuriated California and other states. In many cases, federal Indian reservations were within easy driving distance of major metropolitan areas. State anti-gaming laws now had big, geographic holes in which desperately poor Indian tribes and entrepreneurial casino developers might develop casinos to generate large sums of cash to the exclusion of others. In response to state outcry over the nearly instantaneous growth of unregulated Indian gaming on federal Indian lands, in 1988 Congress established IGRA⁸² to expressly "grant[] states some role in the regulation of Indian gaming."⁸³

⁸¹ *Id.* at 216-222.

⁸² 25 U.S.C. §§ 2701 *et seq.*

With IGRA, Congress asserted its dormant federal powers over tribal sovereigns, and established the first formal non-Indian regulation of Indian casinos. IGRA organized tribal gaming into three classes, each of which became subject to different degrees of regulation. It delegated a major role to state jurisdiction through the requirement of a state tribal compact to engage in the highest class of gaming. Class I gaming, which primarily includes traditional Indian games,⁸⁴ is exempt from state and federal oversight, and remains within the exclusive jurisdiction of tribes.⁸⁵ Class II gaming consists of bingo and non-electronic card games,⁸⁶ and is subject to IGRA and tribal jurisdiction.⁸⁷ Class III gaming, which includes the use of highly lucrative slot machines, may only be conducted by a tribe if the State allows such gaming within its borders and a tribal gaming agreement (or “compact”) is entered into with the state.⁸⁸

⁸³ *Artichoke Joe’s II*, 353 F.3d at 715. According to the Ninth Circuit, “IGRA was Congress’ compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide ‘a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments. ...’ IGRA is an example of ‘cooperative federalism’ in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.” *Artichoke Joe’s II*, 353 F.3d at 715 (quoting *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) [hereinafter *Artichoke Joe’s I*]).

⁸⁴ 25 U.S.C. § 2703(6).

⁸⁵ *See id.* § 2710(a)(1).

⁸⁶ *See id.* § 2703(7).

⁸⁷ *See id.* § 2710(a)(2).

⁸⁸ *See id.* § 2710(d)(1)(c).

Some 354 Indian casinos, all run by federally recognized tribes, are now operating under the IGRA framework, pursuant to compacts negotiated by the governors of 28 states.⁸⁹

3. *IGRA Does Not Preempt State Tribal Gaming Because IGRA Does Not Apply to State Recognized Tribes*

While IGRA explicitly preempts the state regulation of gaming by federal tribes on federal Indian reservations, IGRA does not preempt gaming by state tribes on state-dominion lands, as explained below.⁹⁰ Accordingly, we posit that states are free to reach gaming agreements with state

⁸⁹ See National Indian Gaming Association Library & Resource Center Website, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml> (last visited June 18, 2005).

⁹⁰ See, e.g., S. Rep. No. 466, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 (noting in its discussion of IGRA that “today, tribal governments retain all rights that were not expressly preempted”). In a painstakingly researched article that scrutinizes the origins of the federal government’s power over Native Americans, scholar Mark Savage posits the novel theory that the United States Constitution never granted the federal government plenary power (and therefore preemptive power) over even federally recognized tribes. In his article, he argues that “[t]he United States—its President, its Congress, and its Supreme Court—can exercise no power over Native Americans unless the Constitution grants it. Examination of the text of the Constitution, the intentions of the Framers, contemporary notions about sovereignty, the records of the Continental Congress, and contemporary treaties with Native American nations makes it clear that the Constitution has never granted to the United States a plenary power over Native Americans.” Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 115-116 (1991). Consequently, he argues that “[t]wo hundred years of decisions by the Supreme Court and legislation by Congress and the President lack constitutional authority.” *Id.* at 60. Although years of precedent ignoring this history have rendered his position moot, as advocated

tribes to pursue gaming under state law and on state-dominion lands, such as a state Indian reservation. Ultimately, state tribal gaming on state-dominion lands is not preempted by IGRA for not just one, but two reasons:

(1) Gaming by state tribes falls outside IGRA’s field of preemption, which only covers gaming by federally-recognized tribal sovereigns on federal Indian lands, and

(2) even if gaming by state-recognized tribes falls within IGRA’s parameters, state jurisdiction is compatible with IGRA itself. Thus, even assuming *arguendo* that IGRA did preempt the field of gaming for all Indian tribes on all lands, state and tribal regulation of gaming by state-recognized tribal sovereigns must still be allowed.

a. State-Authorized Gaming by A State Tribe on State-Dominion Lands Falls Outside IGRA’s Preemptive Field

Traditional preemption analysis has two steps. First, any potentially relevant federal legislation is analyzed to see what “field” is preempted. If the state or tribal activity falls outside the preempted field, the activity stands. If the target activity falls inside of the preempted field, the second step is to determine whether state or tribal regulation conflicts or interferes with federal regulation. If not, then such regulation may coexist side-by-side with federal regulation, and again the activity stands.⁹¹

by Savage this argument may still be used “to challenge exercises of state and federal power over Native Americans and their lands and thus to accomplish the ends of self-determination and self-government.” *Id.* at 118.

⁹¹ See, e.g., *Huron Portland Cement Company v. Detroit*, 362 US 440, 443 (1960) (“[i]n determining whether state regulation has been pre-empted by federal action, ‘the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a

So what field of gaming does IGRA preempt? To begin with the obvious, IGRA does *not* preempt state authority over non-Indian “vice activities.” States retain their inherent constitutional police power over vice activities within their borders, including exclusive authority over non-tribal gaming on state-dominion lands. For example, Nevada and New Jersey continue to allow extensive gaming activities in Las Vegas and Atlantic City under their respective state laws. Such gaming lies outside IGRA’s preemptive field. California allows more limited gaming activities by card rooms and horse racing tracks on state lands under California law.⁹² In addition, California itself runs a state lottery and permits gaming for non-profit purposes.

IGRA, by its own terms, applies *only* to gaming conducted on federal “Indian lands”⁹³ and by federal “Indian tribes.”⁹⁴ Neither term appears to reach state-recognized tribes or gaming under state law on state-dominion lands.

IGRA defines “Indian lands” in two parts. “Indian lands” are, first, “any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual, or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power,”⁹⁵ and second, “all lands within the limits of any [federal] Indian reservation.”⁹⁶

limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state”).

⁹² See *Hotel Employees*, 21 Cal. 4th at 604-605 (comparing the types of gaming permitted in Nevada and New Jersey with that permitted in California).

⁹³ 25 U.S.C. § 2702(3).

⁹⁴ 25 U.S.C. § 2702(1)-(2).

⁹⁵ 25 U.S.C § 2703(4)(B) (emphasis added).

⁹⁶ 25 U.S.C § 2703(4)(A).

The first part of the definition explicitly references a federal jurisdiction requirement by limiting “Indian lands” to those held in trust or subject to restriction by the United States. However, the lands of state-recognized tribes are generally not held in trust by the federal government, as they are often only state recognized.⁹⁷ Absent federal acknowledgment of an Indian tribe, one is hard-pressed to argue that any state Indian reservation or other gaming facility would be under federal restriction.

The second part of the definition, “Indian reservation,” is a term that generally refers to federal and not state reservations. As explained in *Enlow v. Bevenue*, “[g]radually the term [“Indian reservation”] has come to describe ‘federally-protected Indian tribal lands,’ meaning those lands which Congress has set apart for tribal and federal jurisdiction.”⁹⁸ Under IGRA, a “reservation” is likely one defined by the Secretary of the Interior and therefore federally recognized: For example, gaming is permitted on lands acquired after October 17, 1988 when “lands are taken into trust as part of ... the initial reservation of an Indian tribe *acknowledged by the Secretary under the Federal acknowledgment process*, or the restoration of lands for an Indian tribe that is restored to *Federal recognition*.”⁹⁹ Also, “[a]n Indian reservation is a reservation of land *that Congress* has withdrawn from the public domain for a variety of purposes, including Indian autonomy.”¹⁰⁰ Therefore, IGRA probably only reaches Indian gaming on federally supervised Indian land.

⁹⁷ Nine states have state Indian reservations: Alabama, California, Connecticut, Georgia, Louisiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oklahoma and Virginia.

⁹⁸ 4 Okla. Tribe. 175, 181 (Oct. 13, 1994) (citations omitted).

⁹⁹ 25 U.S.C. § 2719(b)(1)(B)(ii)-(iii) (emphasis added).

¹⁰⁰ *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm’n*, 136 Idaho 53, 57 (2001) (emphasis added).

As a result, gaming on state-dominion lands, including a state Indian reservation, likely falls outside IGRA. A similar conclusion was reached in the 2005 case, *Nixon v. Coeur d'Alene Tribe*.¹⁰¹ In *Nixon*, a federal Indian tribe conducting gaming on federal lands decided to undertake a new gaming activity, internet gaming, but from a location off reservation and within the state-dominion lands of Missouri. The State sued to stop internet gaming by the tribe, but the tribe argued that IGRA preempted state law, and prevented Missouri from stopping the tribe's gaming activity. The Court found IGRA did not preempt state jurisdiction, even though the tribe was federally recognized and did conduct other gaming under IGRA, because the internet gaming was conducted outside federal "Indian lands":

IGRA established a comprehensive regulatory regime for tribal gaming activities *on Indian lands*. Both the language of the statute and its legislative history refer only to gaming on Indian lands....Once a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State's historic right to regulate this controversial class of economic activities. For example, if the State of Missouri sought an injunction against the Tribe conducting an internet lottery from a Kansas City hotel room, or a floating crap game in the streets of St. Louis, the IGRA should not completely preempt such a law enforcement action simply because the injunction might "interfere with tribal governance of gaming." If the Tribe's lottery is being conducted on its lands, then the IGRA completely preempts the State's attempt to regulate or prohibit. But if the lottery is being conducted on Missouri lands, the IGRA does not preempt the state law claims--indeed, it does not even appear to provide a federal defense--and the case must be remanded to state court.¹⁰²

Pursuant to the 10th amendment and the inherent state authority to regulate "vice activities," gaming by state citizens, state corporations, state tribes and even federal tribes on lands other than federal "Indian lands" can be conducted under state law. And if so allowed by state law, the state law itself is not preempted by federal regulation under IGRA.

¹⁰¹ 164 F.3d 1102 (8th Cir. 1999).

¹⁰² *Id.* at 1108-1109 (internal citations omitted).

Further, just as IGRA does not reach beyond federal “Indian lands” to lands under state jurisdiction, IGRA does not reach beyond federally recognized tribes to state recognized tribes. By its own terms, IGRA only regulates gaming by an “Indian tribe,” a term defined within IGRA as “any Indian tribe, band, nation, or other organized group or community of Indians which ... is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and ... is recognized [by the Secretary] as possessing powers of self-government.”¹⁰³ This Secretary of the Interior recognition requirement limits the definition’s scope to those tribes which have attained formal federal acknowledgment.

Case law confirms that IGRA only applies to federal tribes. As explained in *First American Casino Corporation v. Eastern Pequot Nation*:

IGRA does not apply [to the parties’ agreement] because defendant has not attained formal federal recognition and therefore is not an ‘Indian tribe’ within the meaning of IGRA. Unless and until defendant obtains federal acknowledgment, its activities are not regulated by IGRA. ... Because IGRA’s text unambiguously limits its scope to gaming by tribes that have attained federal recognition, [IGRA] does not apply to defendant’s gaming-related activities.¹⁰⁴

First American Casino Corporation was a breach of contract case involving a gaming management contract that had been entered into by the defendant Eastern Pequots, a state tribe that wanted to conduct gaming under IGRA but had never received formal federal recognition.¹⁰⁵ The plaintiff argued that the defendant tribe had breached the agreement by negotiating with third

¹⁰³ 25 U.S.C. § 2703(5)(A)-(B) (emphasis added).

¹⁰⁴ See, e.g., *First American Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 208-210 (D. Conn. 2000) (citing *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 792 n. 4 (1st Cir. 1996) (“[IGRA] has no application to tribes that do not seek and attain formal federal recognition”).

¹⁰⁵ *Id.* at 206.

parties to find someone other than the plaintiff to finance, develop and manage the tribe's future casino.¹⁰⁶ The defendant tribe removed the case to federal court on the theory that the federal court had subject matter jurisdiction, since the management contract necessarily implicated IGRA.¹⁰⁷ The court ultimately disagreed and held there was no subject matter jurisdiction: Because the Eastern Pequots had not yet received formal federal recognition, IGRA did not apply.¹⁰⁸

The court also rejected the Eastern Pequot's additional argument that IGRA completely preempted the field of tribal gaming, including gaming by a state tribe. The Court stated:

The issue here is whether defendant has shown a clear congressional intent in IGRA to completely preempt plaintiff's state law claims. Two cases from the Eighth Circuit indicate that IGRA completely preempts the field of regulating Indian gaming when the statute applies. ... However, both cases also indicate that IGRA has no such power if it does not apply. ... Because IGRA's text unambiguously limits its scope to gaming by tribes that have attained federal recognition, the statute does not apply to defendant's gaming-related activities. Accordingly, plaintiff's state law claims are not completely preempted by IGRA.¹⁰⁹

The court explained that the Supreme Court has found complete preemption in only three areas, and Indian gaming is not one of them.¹¹⁰

Other cases support the thesis that IGRA does not reach gaming by state tribes. In 2003, the Ninth Circuit found "[t]he operative terms of IGRA expressly relate only to tribes, not to individual

¹⁰⁶ *Id.* at 207.

¹⁰⁷ *Id.* at 206.

¹⁰⁸ *Id.* at 206-208.

¹⁰⁹ *Id.* at 209-210 (internal citations omitted).

¹¹⁰ *Id.* at 209.

Indians. ... Indeed ... only *federally recognized* tribes are covered.”¹¹¹ It also noted, “IGRA pertains to Indian lands and to tribal self-government and [the] tribal status of federally recognized tribes.”¹¹² Thus, gaming by a state tribe that is not federally recognized would not lie within IGRA’s preemptive field. Accordingly, such gaming would remain the purview of the state and its recognized tribes. Gaming by a state tribe on state-dominion land remains within the constitutional purview of state and tribal authority, and state-recognized tribes may conduct gaming activities pursuant to a gaming agreement with the state that recognizes them.

b. Even if Gaming By State Recognized Tribes Falls Within IGRA’s Preemptive Field, Gaming By State Tribes Under State Law Should Still Be Allowable Since Such Gaming Would Not Conflict with IGRA’s Underlying Purposes

The body of case law described above reaches only the first step of the preemption analysis. Since no case has expressly held that gaming by state tribes falls outside IGRA’s preemptive field, however, it is important to turn to the second step, which looks at whether activities that fall *within* the preempted field are, in fact, preempted. Assuming for the sake of argument that gaming by state tribes lies within the preempted field, a further determination must be made as to whether the state or tribal regulation that would authorize the state tribal gaming, conflicts with IGRA. If not, then such regulation may still coexist side-by-side with IGRA, and would not be preempted by IGRA.

Several cases involving Indian gaming analyze when an assertion of state authority would be consistent with, and therefore not preempted by, IGRA.¹¹³ For example, in *Hotel Employees & Restaurant Employees International Union v. Davis*, another Indian gaming case, the California

¹¹¹ *Artihoke Joe’s II*, 353 F.3d at 734 (emphasis added).

¹¹² *Id.* at 736 (emphasis added).

¹¹³ See, e.g., *Hotel Employees*, 21 Cal. 4th at 615 (holding the final sentence of Proposition 5 was not preempted by IGRA because it was “consistent with and furthers the purposes of IGRA”).

Supreme Court stressed that IGRA does not exempt gaming on Indian lands from state regulatory laws and therefore does not preempt state laws regulating gaming, *even by federal tribes on federal Indian reservations*.

IGRA does not exempt gambling on Indian lands from state regulatory laws. Indeed, section 23 of IGRA provides that “for purposes of Federal law, all State laws pertaining to the licensing, regulation or prohibition of gambling ... shall apply in Indian country.”¹¹⁴

In *Hotel Employees*, a number of parties, including a labor union, sought to invalidate Proposition 5, the Tribal Government and Economic Self-Sufficiency Act of 1998. Proposition 5 was a voter initiative passed to authorize Las Vegas-style gaming in tribal casinos. The union argued that the proposition conflicted with state and federal law, and therefore was invalid. The California Supreme Court agreed, explaining the proposition was invalid because it authorized forms of gaming that the California constitution prohibited. The tribes countered that, regardless of the California Constitution, IGRA preempted the regulation of Indian gaming by California and therefore preempted the state constitution’s anti-casino provision.¹¹⁵ The California Supreme Court disagreed and found that IGRA itself preserved state authority: IGRA’s provisions limited its own preemptive reach by requiring that Indian gaming comply with state gambling laws. The court noted only one exception to that general rule – that portion of IGRA which permits Class III gaming under tribal/state compacts.¹¹⁶

Thus, even IGRA’s own language appears to limit its power to exclude state law from regulating vice activities on state-dominion land, whether the gaming is conducted by state citizens,

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 611.

¹¹⁶ *See id.*

state corporations or state tribes. IGRA itself establishes that state gambling laws may apply within the preempted field of gaming on federal “Indian lands,” unless the state’s regulatory scheme conflicts or interferes with a tribal-state compact under IGRA.¹¹⁷ And even then, according to IGRA’s own language, the parameters of gaming permitted by that compact must be compatible with state law. *A priori*, state gambling laws must operate freely on non-federal lands under state control. And states should be able to authorize gaming on such lands by non-federal tribes, just as they could authorize such gaming for any other party.

*Salt River Pima-Maricopa Indian Community v. Hull*¹¹⁸ further illuminates when the assertion of state authority in an Indian gaming context does not conflict with, and therefore is not preempted by, IGRA. In *Salt River*, the court considered an Arizona proposition mandating the terms of a tribal gaming agreement, irrespective of what the Governor or Legislature might wish to negotiate. Arizona’s Governor argued that the proposition was preempted by IGRA, which has specific provisions regarding how compacts must be negotiated, but the Arizona proposition removed the Governor’s IGRA-based authority to negotiate the terms of such compacts and so directly conflicted with those provisions.¹¹⁹ The court found no such preemption, even though the proposition clearly entered IGRA’s preemptive field.¹²⁰ The court upheld the proposition as compatible with IGRA, because the state could still negotiate compact terms; the proposition just set a minimum for what the state could offer.¹²¹ The court stressed that the purpose of IGRA is “to give Indian tribes a mechanism through which to force a reluctant state government to the

¹¹⁷ *See id.*

¹¹⁸ 190 Ariz. 97 (1997).

¹¹⁹ *Id.* at 100.

¹²⁰ *Id.* at 103.

¹²¹ *Id.* at 101.

bargaining table and require it to negotiate a compact in good faith.”¹²² Thus, even though the state gaming proposition fell within the preempted field, its purpose was sufficiently consistent with IGRA to be upheld, and not be preempted.

In light of *Salt River*, assuming *arguendo* that a state law authorizing a state tribe to conduct gaming on state-dominion land was within IGRA’s preemptive field, the state law would not be preempted so long as it was compatible with IGRA’s purpose. So what is IGRA’s purpose? According to the California Supreme Court, the IGRA’s mission is to balance state interests in regulating gaming within state borders, with federal interests in allowing federal tribes to operate casinos on federal Indian reservations and support tribal economies.¹²³ One way IGRA fulfills this mission is by encouraging states to negotiate with tribes to create tribal gaming compacts to control gaming within state borders.¹²⁴ However, by agreeing to enter into a gaming compact with a state tribe, a state would already be at the bargaining table, and thus IGRA would not be needed to compel such negotiation.

Once again, this article addresses the situation of a state and state tribe that wish to engage in gaming, *not* a state attempting to stop an Indian tribe from gaming, the latter of which IGRA was

¹²² *Id.* at 102.

¹²³ *See* *Hotel Employees*, 21 Cal. 4th at 612.

¹²⁴ *See, e.g.*, 25 U.S.C.A. § 2710(d)(3)(A) (establishing that tribes “having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities,” and that “[u]pon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.”)

needed to address; the former already parallels IGRA's interest in getting states and tribes to work together.

State tribal gaming would also agree with at least one other purpose expressly stated in IGRA – “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”¹²⁵ By allowing state tribes to generate much needed revenue through gaming agreements under state law, such tribes would be able to further their tribe's economic development and self-sufficiency, and thereby strengthen their tribal governments. Ultimately, *state* interests in supporting the economic development and self-sufficiency of a state tribal government are consistent with Congress' interests in economic development and tribal self-sufficiency in *federal* Indian gaming.¹²⁶ In *Cabazon*, the Supreme Court noted the tribes' and federal government's interests in tribal economic development, emphasizing their extreme importance: “The tribal games at present provide the sole source of revenues for the operation of the tribal government and the provision of tribal services ... Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.”¹²⁷ Similarly, in *Hotel Employees*, the California Supreme Court emphasized IGRA's interest in “promot[ing] tribal economic development, self-sufficiency, and strong tribal governments.”¹²⁸

¹²⁵ 25 U.S.C. § 2701(4).

¹²⁶ See, e.g., S. Rep. No. 466, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072-3073 (noting the federal government's interests in fostering tribal gaming based on the benefits that accrue to tribes).

¹²⁷ *Cabazon*, 480 U.S. at 218-219.

¹²⁸ 21 Cal. 4th at 612.

Here, it is also “tribal self-sufficiency and economic development” that are at stake. Since a state compact with a state tribe apparently parallels the purposes underlying IGRA, such agreements should not be preempted, even if IGRA occupies the field.

Ultimately, gaming by a state tribe on a state Indian reservation under state law could be carefully tailored to allow state-recognized tribes the same economic development opportunities as those provided by IGRA for federal tribes operating casinos on federal “Indian lands.” The state laws might parallel IGRA’s provisions, the games allowed might parallel existing gaming at IGRA-licensed casinos, and the agreements between states and their recognized tribes might parallel states’ existing gaming compacts with federal tribes. Such gaming could be strictly limited to state-recognized tribes on state-dominion lands, including existing or newly created state Indian reservations.¹²⁹ Thus, carefully tailored state law and state gaming compacts could be made comparable to IGRA to avoid any conflicts with federal Indian gaming.

4. *State Tribal Gaming Is Also Not Preempted by the Federal Johnson Act*

A second federal act that preempts some forms of tribal gaming is the Johnson Act, which reads in relevant part: “It shall be unlawful to ... sell, transport, possess, or use any gambling device ... within Indian country as defined in section 1151 of Title 18.”¹³⁰ The Act makes several means of gambling, including the use of slot machines, illegal in “Indian country.”¹³¹

¹²⁹ Tribal lands that may be considered state Indian reservations currently exist in Alabama, Connecticut, Louisiana, Massachusetts, New Jersey, New York, Oklahoma, Ohio, and Virginia. See research on file with the authors.

¹³⁰ 15 U.S.C. § 1175(a).

¹³¹ One exception to this general prohibition on gaming within Indian country is for those tribes that have a valid compact under IGRA. See 25 U.S.C. § 2710(d)(6)(A)-(B). However, since IGRA does

Ultimately, the definition of “Indian country” limits the preemptive effect of the Johnson Act in the same manner as the definition of “Indian lands” limits the preemptive effect of IGRA. The Johnson Act does not apply to most state tribes because most state tribes’ lands are state-dominion lands that simply do not qualify as “Indian Country.”

“Indian Country” is a term of art defined by federal statute:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country” ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ... and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹³²

First, under subsection (a) above, since state tribes’ lands are not under federal jurisdiction, their state reservations would not qualify as a reservation under the jurisdiction of the United States government.

Second, under subsection (b) above, most state tribes’ lands would not qualify as “dependent Indian communit[ies].” The United States Supreme Court, in *Alaska v. Native Village of Venetie Tribal Government*,¹³³ explained what was meant by “dependent Indian community”: “[“Dependent Indian community”] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal

not apply to state tribes, if the Johnson Act applies, it *would* present a barrier to a state recognized tribe’s Class III gaming efforts.

¹³² 18 U.S.C. § 1151.

¹³³ 522 U.S. 520, 527 (1998).

Government for the use of the Indians as Indian land; second, they must be under federal superintendence.”¹³⁴

In *Venetie*, a tribe’s original reservation had been revoked and therefore could not satisfy a federal set-aside requirement.¹³⁵ With revocation, federal superintendence over the land had been eliminated.¹³⁶ Even the federal government providing the tribe with “desperately needed social programs [could not] support a finding of Indian country.”¹³⁷ In our case, where a state tribe would conduct gaming on a state Indian reservation, a finding that the state Indian reservation qualified as “Indian country” would be difficult. Most state tribes’ traditional reservations have been revoked and most existing lands would not have been set aside by the federal government, as the tribes are not federally recognized. Instead, it is often the state government that has recognized them and set aside their tribal lands. For example, if the Gabrielino-Tongva tribe were to gain back its tribal lands through state legislation, such a state Indian reservation would not automatically be subject to federal superintendence. The Gabrielino’s reservation at San Sebastian was lost long ago and only that land would come close to the requirement of “federal superintendence.” Thus, a new state Indian reservation for the Gabrielinos would not qualify as a dependent Indian community, or as “Indian country” under the Johnson Act.

Third, under subsection (c) above, most state tribes’ lands would not be “Indian allotments ... titles to which have not been extinguished.” An Indian allotment is land owned by an individual

¹³⁴ *Id.*

¹³⁵ *Venetie*, 522 U.S. at 532.

¹³⁶ *Id.* at 533.

¹³⁷ *Id.* at 534.

Indian that was parceled out of a larger federal reservation.¹³⁸ Most allotments existed during the first half of the 20th century following passage of the General Allotment Act or “Dawes Act;”¹³⁹ as explained above, the Act was part of a federal program designed to assimilate Indians into mainstream western culture.¹⁴⁰ Tribal lands were broken up into a series of individual “allotments” that were then issued to individual tribal members who could live on or sell the land at will. This program failed, however, because most tribal members – many of whom were cash poor - sold their land to non-Indians for small sums of money that were quickly spent, and the act never made the tribal members self-sufficient as originally planned. The Reorganization Act¹⁴¹ was passed by Congress in 1934 to put an end to the allotment program.¹⁴² Since tribal title to most allotments was extinguished during the first half of the twentieth century, however state Indian reservations would not fall within this definition.

Thus, since both IGRA and the Johnson Act – the two primary federal acts that regulate Indian gaming – do not apply to state tribes, it is unlikely the federal government has preempted the field of gaming for all state tribes. General policy supports this argument: originally, the conflict over whether tribes could conduct gaming was a state/tribal issue, not a federal one. The main reason federal law became involved in gaming was to encourage states and tribes to “get along.”

¹³⁸ See *Indian Tribal Governments: FAQs Regarding Terminology*, Internal Revenue Service Website, <http://www.irs.gov/govt/tries/article/0,,id=108431,00.html#A4> (last visited Aug. 12, 2004) [hereinafter IRS Website].

¹³⁹ An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment or Dawes Act), 25 U.S.C. §§ 331-381, 24 Stat. 388-91 (1887).

¹⁴⁰ See IRS Website, *supra* note 139.

¹⁴¹ Indian Reorganization Act (Wheeler-Howard Act), 25 U.S.C. §§ 461-479 (1934).

¹⁴² See IRS Website, *supra* note 139.

Where a state seeks to foster Indian gaming by a state tribe, rather than prohibit it to a federal tribe, such acts are not needed, and were never intended to apply. Likewise, where gaming is permitted on state-dominion lands rather than on federal Indian reservations, the application of such acts is both unneeded and unintended.

CONCLUSION THREE: Gaming by state tribes, by other state-authorized parties, and even by federally-recognized tribes that is not conducted on federal “Indian lands” is not reached by IGRA or the Johnson Act. Thus gaming by a state tribe on state-dominion land, such as a state Indian reservation, remains within the constitutional purview of state authority. As a result, state-recognized tribes may conduct gaming activities where acceptable under state law.

D. Gaming by State-Recognized Tribes Does Not Violate Equal Protection

After federal preemption, the most significant argument raised by state tribal gaming opponents is that Class III gaming by state tribes would violate equal protection. Opponents argue that giving state tribes gaming rights not enjoyed by other state citizens or corporations would be an unlawful racial preference that violates the 14th Amendment’s guarantee that all be treated equally, that no one be denied “equal protection of the laws.”¹⁴³

Analysis of federal precedents provides a strong counterargument. Today, *most* legislation benefiting federal tribes does not violate equal protection. For example, IGRA and other federal statutes have repeatedly withstood equal protection challenges even though they benefit Native American tribes to the exclusion of other groups, because such discrimination is based upon a political classification, the tribes’ governmental status, and not race. As shown below, the same

¹⁴³ U.S. Const. amend. XIV, § 1.

argument protects state laws that allow gaming by state Indian tribes based upon their governmental status.

1. The Mancari Doctrine and Artichoke Joe's

*Morton v. Mancari*¹⁴⁴ is the seminal authority that explains when laws favoring American Indians do not violate equal protection.¹⁴⁵ In *Mancari*, the Supreme Court held that a BIA hiring preference for Indians did not violate equal protection because “[t]he preference, as applied, [was] granted to Indians not as discrete *racial* groups, but, rather, as members of quasi-sovereign *tribal entities*.”¹⁴⁶ The Court reasoned that “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”¹⁴⁷ With this statement, a “political versus racial” distinction became the litmus test for whether rational basis should be applied to tribal-friendly legislation, or whether such legislation should be reviewed with strict scrutiny. If a rational basis test is applied, federal legislation helping federal tribes is usually found to complement governmental objectives, and easily found constitutional; conversely, if strict scrutiny is applied, such legislation is usually found unconstitutional. Thus, applicable cases tend to battle over whether application of strict scrutiny or a rational basis test is most appropriate.

The tribal gaming jurisprudence that built on *Mancari* has followed the *Mancari* Court’s approach. *Mancari* was recently applied by the Ninth Circuit in 2003 in perhaps the most important

¹⁴⁴ 417 U.S. 535 (1974).

¹⁴⁵ See, e.g., *Artichoke Joe’s II*, 353 F.3d at 732 (recognizing *Mancari* as the starting point for Equal Protection analysis).

¹⁴⁶ *Mancari*, 417 U.S. at 554.

¹⁴⁷ *Id.* at 554 n.24.

equal protection case addressing Indian gaming: *Artichoke Joe's California Grand Casino v. Norton*. In *Artichoke Joe's*, plaintiff card rooms and charities challenged the validity of the tribal gaming compacts entered into between California and a large number of federally recognized Indian tribes. Plaintiffs argued that allowing only tribes to operate Las Vegas style casinos to the exclusion of non-tribal casino operators violated the latter's equal protection rights under the Fifth and Fourteenth Amendments by making an impermissible race-based preference in favor of the tribes.¹⁴⁸ The court applied *Mancari* to determine whether the tribal compacts represented a race-based preference, or one that was political.¹⁴⁹ Based on *Mancari*, the court found allowing tribal governments to have a monopoly on Class III gaming was predicated on a political and not racial designation, and therefore did not violate equal protection.

Ultimately, as declared in *Artichoke Joe's*, a tribal gaming equal protection analysis

requires ... answer[ing] two questions. First, [it must be decided] whether the distinction between Indian and non-Indian gaming interests is a political or a racial classification, so we can determine the proper level of deference that is owed to the classification. Second, [it must be decided] whether, under the applicable standard of review, legitimate state interests justify the grant to Indian tribes of a monopoly on class III gaming.¹⁵⁰

As explained below, gaming by state recognized tribes satisfies both tests.

2. Application of Mancari and Artichoke Joe's To Gaming By State-Recognized Tribes

a. The Distinction Between Gaming by State Recognized Tribes Versus Non-Indian Gaming Interests Represents a Political Classification

¹⁴⁸ *Artichoke Joe's II*, 353 F.3d at 714.

¹⁴⁹ *Id.* at 732.

¹⁵⁰ *Id.* at 731.

State laws favoring gaming by state tribes should be subject to rational basis review and not strict scrutiny, similarly to laws favoring federally recognized tribes. State tribes – like federal tribes - are political entities and not racial groups: Similar to federal recognition, state recognition “operates to exclude many individuals who are racially to be classified as Indians,” the *Mancari* test for when a preference “is political rather than racial in nature.” Like federally recognized tribes, state tribes must earn formal recognition by an independent government entity: in this case, the state. Consequently, not all self-defined, non-federally recognized tribes would qualify. In fact, most would not. Like federally recognized tribes, state-recognized tribes are subject to whatever screening criteria states deem critical for recognizing a tribe. The only difference is that a state government has recognized the tribe in lieu of the federal government.

Opponents nonetheless will argue that the rational basis standard advocated in *Mancari* was dependent not so much on the “political versus racial” distinction, but on the fact of *federal recognition*. And there is support for that argument in *Mancari*: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.” However, it is not clear that Congress’ recognition was the primary determining line for the *Mancari* court, which also stressed the importance of distinguishing political entities from individual Native Americans. While the Court found that federally recognized tribes qualify as political entities for purposes of applying the less rigorous rational basis scrutiny on the basis of Congress’ recognition of their government status, that does not necessarily mean that the “political versus racial” distinction can not be applied to other Indian groups to see if they might also qualify as political entities. This approach especially makes sense considering that equal protection

jurisprudence generally operates to avoid impermissible “race-based” classifications, and usually has little to do with “Congress’ unique obligation[s].”

Opponents may also argue that because *Mancari* dealt only with a subset of the tribal population –federally recognized tribes – its precedential value should be limited to that population. However, *Mancari* does not have to be interpreted so narrowly; as noted in *Arakaki v. Lingle*,¹⁵¹ the *Mancari* Court “did not have before it any question as to whether the Native Americans being given the preference were from federally recognized Indian tribes.”¹⁵² Consequently, there was no reason to specifically mention state recognized tribes – especially when state recognized tribes are a minor and often overlooked subset of the Native American tribal population.

Ultimately, *Mancari* states principles that reach beyond federally-recognized tribes to address the nature of tribal sovereignty itself. For example, the *Mancari* Court noted that a preference reasonably related to a “legitimate, nonracially based goal ... is the *principal characteristic* that generally is absent from proscribed forms of racial discrimination.”¹⁵³ This suggests the court’s concern was truly with racial discrimination, and not with legislative attempts to limit participation in a particular industry to federal tribes. Thus it is difficult to imply that the court would use the strict scrutiny test only when faced with federally recognized tribes, but not state-recognized tribes. Both are tribal sovereigns subjugated by the United States. Whether the United States grants recognition or one of its federalist states grants recognition, a longstanding tribe is nonetheless a “quasi-sovereign entity,” and not just a racial group.

Applying the “political versus racial” analysis to the state-recognized Gabrielino-Tongva or Shinnecock tribes, there is a strong argument that formal state recognition of the tribes is

¹⁵¹ 305 F. Supp. 2d 1161 (D. Hawaii Jan. 14, 2004).

¹⁵² *Id.* at 1168.

¹⁵³ *Mancari*, 417 U.S. at 554 (emphasis added).

recognition of a sovereign political community, not a specific racial group. Using the Gabrielino-Tongva as an example, the relevant *racial* classification would consist of a much larger group of individuals, such as “Mission Indians,” “Shoshone Indians,” or “Native Americans.” These are classifications which cross tribal government boundaries. In California, several different tribes include members who can be classified as Mission Indians, as Shoshone Indians, or Native American. Just as Asian-Americans of Japanese heritage (the racial and ethnic classifications) can also be citizens of a particular state (the political or government classification), Native Americans (the racial classification) may be citizens of a particular tribe (the government classification). Similarly, the Gabrielino-Tongva Tribe excludes many Mission and Shoshone Indians and certainly most Native Americans. The character of the Gabrielino-Tongva Tribe is political as much because of its organizational attributes as a state-recognized sovereign, as its exclusion of other members of the same racial group. All three of these factors work in the same direction: the Tribe’s external recognition by California; the Tribe’s internal organization as a tribal sovereign government; and the Tribe’s exclusivity independent of other members of the same racial group, all strongly suggest the Gabrielino-Tongva Tribe is not a racially determined entity, but one that is politically defined.

While opponents argue that state recognition cannot stand in as a relevant political classification because it is not as “formal” as federal recognition (in part because criteria for state recognition vary dramatically from state to state), even the *federal government* has recognized that states have the authority to officially recognize tribes. By extending some federal benefits to state recognized tribes on the basis of their tribal classification *as* state recognized, the federal government has legitimized state recognition, and thereby validated state recognition as a classification. Examples of federal regulations that extend federal benefits to state tribes include

Health and Human Services Block Grants;¹⁵⁴ Administration of Food Stamp Programs on Indian Reservations;¹⁵⁵ Energy Conservation Grant Programs;¹⁵⁶ and Native American Welfare Programs.¹⁵⁷

These regulations presumably withstand equal protection scrutiny despite their inclusion of state recognized tribes, further suggesting federal recognition is not necessary for tribal legislation to survive an equal protection analysis. Additionally, while recognition by state governments may deliver less in the way of concrete rights and obligations than federal recognition, state recognition can be every bit as solemn. The thirteen states that have recognized non-federal Indian tribes have used a variety of methods to do so. These range from the passage of joint resolutions (as in California and Louisiana) to comprehensive statutory frameworks that grant significant substantive rights (as in North Carolina).¹⁵⁸

¹⁵⁴ 45 C.F.R. §96.44(b) (providing direct funding to Indian tribes, and defining such tribes as including “organized groups of Indians that the state in which they reside has determined are Indian tribes”).

¹⁵⁵ 7 C.F.R. §281.2(a)(1) (recognizing as an “established reservation” those areas “currently recognized and established by Federal or State treaty”).

¹⁵⁶ 10 C.F.R. §455.2 (defining an eligible Indian tribe as “any tribe ... which ... is located on, or in proximity to, a Federal or State reservation or rancherias).

¹⁵⁷ 45 C.F.R. §1336.10 (defining “Indian” as “a member or descendent of a member of a North tribe ... who ... [has] a special relationship with the United States or a State through treaty, agreement or some other form of recognition”).

¹⁵⁸ *See, e.g.*, Cal. Jt. Res. 96, Chapter 146, 1993-1994 Reg. Sess. (Sept. 13, 1994) (recognizing the Gabrielino Tribe of Los Angeles); Cal. Jt. Res. 48, Chapter 121, 1993-1994 Reg. Sess. (Sept. 22, 1993) (recognizing the Juaneno Band of Mission Indians in Orange County); N.C. Gen. Stat. §§

Finally, state tribal gaming opponents may try to argue that rational basis review can only be applied to *federal* laws that favor Indians, not to state laws that would be necessary to grant a preference to state-recognized tribes to conduct gaming on a state Indian reservation.¹⁵⁹

In *Washington v. Confederated Tribes of the Yakima Indian Nation*,¹⁶⁰ the Supreme Court provided the first step toward disarming that argument, although the majority opinion limited its own scope of decision. In *Yakima*, rational basis review was applied to a Washington *state* law favoring federal Indian tribes; however, the court based its application of rational basis review on the fact that a federal law (Public Law 280) had authorized extending that state law into Indian country.¹⁶¹

But even without the involvement of any federal authority, the political classification argument should survive when applied to state law. As established above, gaming is a vice activity subject to the state's police power to regulate gaming within its sovereign borders.¹⁶² As noted in

71A-7.1-71A-7 (recognizing North Carolina's eight state tribes); *see also* Alexa Koenig and Jonathan Stein, *2004 Survey of State-Recognized Tribes* (2004) (on file with the authors).

¹⁵⁹ Most of our arguments assume such gaming is desired by both the tribe and state. IGRA only requires states to negotiate gaming compacts with federally recognized tribes; neither it nor any other statute compels the state to negotiate such agreements with state recognized tribes or vice versa. We argue only that compacting over tribal gaming should be an option available to state recognized tribes and each state, not that it is something that can or should be foisted on either sovereign.

¹⁶⁰ 439 U.S. 463 (1979).

¹⁶¹ *Id.* at 500-501.

¹⁶² *See Artichoke Joe's II*, 353 F.3d at 737: "The circuits that have given significant attention to equal protection challenges to state gambling laws have, by and large, held that 'the regulation of

Artichoke Joe's, under the state's police power, states have great leeway to grant monopolies and not violate Equal Protection considerations: "Where there exists an appropriate connection to the state's police power, even the grant of a monopoly does not, in itself, offend equal protection principles."¹⁶³ So long as state law grants this monopoly to a politically classified group, such as a state tribe, and not a racially classified group, such as all Native Americans, the 14th Amendment rational review standard should apply.

Holding otherwise, and denying rational basis review just because there is no federal authority involved, takes an unnecessarily narrow view of equal protection jurisprudence. Several preeminent scholars in the field of Indian law have similarly suggested that a federal connection is not necessary to justify the application of rational basis review and thereby survive equal protection scrutiny. As argued by Felix S. Cohen, "[T]he Supreme Court held long ago that the federal relationship with tribes does not preclude protective state laws which do not infringe on federally protected rights. ... If Indians are a legitimate classification for protective federal laws, their status is arguably the same for state laws of that character. Such state laws have long been assumed valid."¹⁶⁴

gambling lies at the heart of the state's police power'" (partially quoting *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003)).

¹⁶³ *Artichoke Joe's II*, 353 F.3d at 712.

¹⁶⁴ Felix S. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 659 (2d ed. 1982). Carole Goldberg of UCLA has also argued that state legislation can escape strict scrutiny, so long as that legislation carries forward established federal policies – in this case, such policies would be tribal economic development and self-sufficiency. While "[h]elping isolated individuals, without any perceptible group impact, will not suffice," she posits that equality based challenges to state legislation can be surmounted so long as the state law "advance[s] group interests in self-determination, encompassing

Ultimately, the only restriction on states appears to be that their preferred classification (such as allowing Class III gaming by state recognized tribes, and not the general population) be reasonable:

When the subject of legislation falls under the police powers of the state, activities may be prohibited altogether, limited as to place and location, or, where operation is permitted, may be regulated by rules of conduct. These laws enacted under the police powers must be subject to the restriction that the prohibition, limitation or regulation, must apply to all alike who come within a reasonable classification of persons or property. The fact that because of classification the statute does not apply to every person alike is no valid objection to its constitutionality, for classification itself presupposes inequality of application and the courts may only inquire if the classification is reasonable and founded upon some logical, natural, intrinsic or constitutional distinction between people composing a class and others not embraced within it.¹⁶⁵

b. Legitimate State Interests Justify Granting Federal and State Recognized Tribes a Monopoly on Class III Gaming

Gaming by state recognized tribes on state-dominion land under state law also passes the second half of the 14th Amendment analysis: whether legitimate state interests justify granting both state and federal tribes a monopoly on Class III gaming. In *Artichoke Joe's*, after determining that rational basis review applied to the tribal-state compacts, the court concluded the tribal gaming compacts survived equal protection analysis because legitimate state interests were rationally

the tribe's economic, cultural and political advancement.” Carole Goldberg, *American Indians and “Preferential Treatment,”* 49 UCLA L. REV. 943, 967 (2002).

¹⁶⁵ *People v. Sullivan*, 60 Cal. App. 2d 539, 541 (1943) (citing *Barbier v. Connolly*, 113 U.S. 27 (1884); *Patterson v. Kentucky*, 97 U.S. 501 (1878); *Plumley v. Massachusetts*, 155 U.S. 461 (1894)).

related to granting a Class III gaming monopoly to California's federally recognized tribes.¹⁶⁶ The court found that the state had two legitimate interests in granting the monopoly: 1) an interest in regulating gaming as a "vice activity," and 2) promoting "cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency."¹⁶⁷

Extending the Class III gaming monopoly from federally-recognized tribes to federal *and* state tribes concords with both interests. As for the first, state tribal gaming could be permitted only under a tribal-state compact, similar or identical to gaming compacts with federal tribes. Accordingly, the state would be able to control the conditions under which such Class III gaming would be conducted, and thus would have a hand in regulating state tribal gaming as a vice activity. As in *Artichoke Joe's*, limiting Class III gaming to a larger category that includes both federal and state tribes would continue to be rationally related to the stated regulatory interest in "foster[ing] California's legitimate [state] sovereign interest in regulating the growth of Class III gaming in California" and "limiting Class III gaming operations ... [to] defend against the[ir] criminal infiltration."¹⁶⁸

As for the second interest -- promoting cooperation with tribal sovereigns and fostering tribal self-sufficiency -- extending the gaming monopoly to state tribes similarly helps California enter "a new era of tribal-state cooperation in areas of mutual concern."¹⁶⁹ State tribes, like federal tribes, faced some of the most brutal episodes of genocide, racism and government-sponsored abuse in our Nation's history -- episodes which obliterated many tribes, and stripped the government

¹⁶⁶ The court did not consider whether this monopoly extended to state-recognized tribes. The Gabrielino-Tongva tribe argues that it does.

¹⁶⁷ *Artichoke Joe's II*, 353 F.3d at 736-737.

¹⁶⁸ *Id.* at 740.

¹⁶⁹ *Id.* at 741.

classification from many others. Recognizing the legitimacy of state tribes would help repair the same damage that was done to federal tribes, by reaching those state-recognized tribal sovereigns that, by fluke of history, never gained federal acknowledgment. As with federally recognized tribes, allowing state sovereigns to conduct Class III gaming operations would strengthen a “mutually respectful government-to-government relationship that [serves] the mutual interests of the tribes and the State,”¹⁷⁰ by helping them build their economic and political foundations.

Artichoke Joe’s even suggests – albeit indirectly -- that gaming by state recognized tribes on a state Indian reservation under state law could offer an even *stronger* case for allowing a Class III gaming monopoly, than in situations involving federally recognized tribes. In dicta, the *Artichoke Joe’s* opinion used the analogy of state subdivisions to marshal its equal protection arguments:

Were the tribal lands a political subdivision of the State, California’s exemption of tribal lands from its state-wide prohibition on class III gaming activities easily would withstand constitutional scrutiny. When enacting substantive regulations or prohibitions of vice activities, the interests implicated lie at the heart of the state’s police power. With regard to these activities, a state is free to enact legislation that accords different treatment to different localities, and even to different establishments within the same locality, so long as that determination is tied to a legitimate interest in the health, safety or welfare of its citizens. The state may make such distinctions by local-option laws, or by making the distinction between different areas itself. It may impose more stringent regulations by way of local restrictions, or it may exempt an area entirely. ... Unless such legislative distinctions infringe fundamental rights or involve suspect classifications, they generally survive equal protection analysis.¹⁷¹

¹⁷⁰ *Id.* at 741.

¹⁷¹ *Id.* at 740. *See also* *People v. Sullivan*, 60 Cal. App. 2d 539, 541 (1943) (noting that the states have significant leeway to favor certain groups when legislating with respect to a state police power, such as gaming. The primary limit is that the favored group’s classification be “reasonable”).

In the case of state tribes, a state-created Indian reservation would arguably be a political subdivision of the state and fall squarely within the argument. Consequently, the state would have enormous power to permit Class III gaming on a state Indian reservation to the exclusion of other locales.

Finally, extending the monopoly on Class III gaming from federal tribes to federal *and* state tribes would concord with the general gaming policies of several states that allow exceptions to their anti-casino policies when proceeds benefit government or non-profit purposes, fulfilling a legitimate state interest in providing funding for such entities.¹⁷² For example, California's constitution has long provided exceptions to its anti-gaming provisions by permitting a state lottery to generate income for the state government. Permitting Class III gaming by California's state recognized tribes would go a long way toward providing for tribal government coffers, just as the California lottery does for the state.

CONCLUSION FOUR: Gaming by state-recognized tribes does not violate equal protection laws that forbid state governments from discriminating in favor of one racial group, because state tribes are political groups, and not racially-defined entities.

E. Significant Policy Arguments Support Gaming By State-Recognized Tribes

Finally, just as with federal tribal government gaming, numerous policy arguments support recognizing Class III gaming rights for state recognized tribes. These include generating jobs and revenue for tribal governments and thereby fostering self-sufficiency; raising revenue for and increasing economic activity in surrounding communities; supporting the most documented of the

¹⁷² See Cal. Const. art. IV, § 19(c) (permitting bingo for charitable purposes) and § 19(d) (authorizing establishment of a California state lottery).

nation's non-federally recognized tribes while they wait out the often protracted federal recognition process; and upholding the sovereign rights of both states and the tribes they recognize.

1. Proceeds From Tribal Gaming Benefit States and Tribes By Generating Jobs and Revenue

As with federal tribal gaming, state tribal gaming has the potential to provide tremendous social and economic benefits for tribal governments, local communities, and states. Gaming by federally recognized tribes “has generated thousands of jobs; created a market for local suppliers; raised revenue to benefit local charities; helped remove members of both gaming and non-gaming tribes from welfare rolls; generated millions of dollars in state and federal taxes; provided schools for tribal youth; and reinvested in local communities.”¹⁷³ According to the 2004 Meister report, the impact of tribal gaming on the national economy has been significant, having contributed 460,000 jobs, \$16.3 billion in wages, \$42.7 billion in output and \$5.3 billion in tax revenue. Through revenue sharing programs, approximately \$759 million has been forwarded to the states.¹⁷⁴ The even more recent Analysis of the Economic Impact of Indian Gaming in 2004, published in 2005 by the National Indian Gaming Association, suggests that those benefits are only growing: total revenues generated by Indian gaming have jumped to a staggering \$18.5 billion. More than half a million jobs have been created by tribal gaming and ancillary businesses, reducing federal government unemployment benefits and welfare payments by \$1.4 billion. More than \$100 million has been generated for local businesses, as well as \$1.8 billion in state government revenue, and \$5.5 billion in federal taxes.¹⁷⁵ Gaming by state recognized tribes would only add to these figures.

¹⁷³ Koenig, *supra* note 11, at 1065.

¹⁷⁴ See Doug Abrams, *State's Indian Casinos Earn \$4.2 Billion*, THE DESERT SUN (July 7, 2004).

¹⁷⁵ See National Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2004*, available at <http://www.indiangaming.org> (last visited June 5, 2005).

2. *State Recognition Is a Viable Alternative To The Unwieldy Federal Recognition Process*

The creation of state tribal casinos would also enable state recognized tribes – those which arguably have the strongest cases for federal recognition – to strengthen their economies and provide valuable services for their tribal members while they await federal recognition. Securing federal recognition is not a simple alternative for tribes. While there are three possible paths to obtaining such recognition, they are time consuming, difficult and often enormously expensive to navigate – if they work at all. For many tribes, any chance of federal recognition is decades off ... decades during which significant good could be done for the tribal government and surrounding communities, and decades during which their inherent rights as sovereign tribes have been put on pause.

The first option for such tribes is to try to gain recognition through the federal legislative process. This is so difficult to achieve, however, that Congress has granted recognition to only two California Indian tribes in the last 10 years.¹⁷⁶

The second and most common route is for tribes to secure recognition through the executive process, as represented by the BIA and its formal acknowledgement process set forth in 25 C.F.R. § 83 *et seq.* This route, however, may be the most time consuming of all. The BIA's process involves a number of steps: each tribe must first file a letter of intent requesting federal recognition

¹⁷⁶ See, e.g., 25 U.S.C. § 1300m-1 (granting federal recognition to the Paskenta Band of Nomlaki Indians in 1994); see also 25 U.S.C. § 1300n-2 (granting federal recognition to the Federated Indians of Graton Rancheria in 2000). Two other tribes – the Ione Band of Miwok Indians and the Lower Lake tribe – had their recognition clarified administratively. E-mail from Cindy Darcy, Senate Subcommittee on Indian Affairs, to Alexa Koenig, Instructor of Law, University of San Francisco School of Law (August 1, 2005) (on file with the author).

and noting that tribe's intent to submit a documented petition.¹⁷⁷ Second, the tribe must submit a documented petition,¹⁷⁸ and third, the tribe must present evidence that demonstrates it can meet the mandatory criteria laid out in 25 C.F.R. § 83.7. The Gabrielino-Tongva Tribe has filed several letters of intent, reserving Petition Nos. 140, 140a, 176 and 201, to begin the recognition process. Because the BIA operates very slowly,¹⁷⁹ the BIA is not expected to consider No. 140 – the tribe's first shot at recognition -- for more than a decade. The Shinnecocks first filed for recognition in the 1970s; their petition has similarly languished without resolution for years. The process has proven so unwieldy, even the man who created it in 1978 calls it a “monster,” admitting that “the standards got to be impossible.”¹⁸⁰

The third option is to try to secure recognition judicially. This route is neither easy nor routine. One type of judicial recognition is “federal common law” recognition. Courts have declared many state recognized tribes, including the Gabrielino-Tongva,¹⁸¹ federal common law tribes. These are defined as “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined

¹⁷⁷ See 25 C.F.R. § 83.4(a).

¹⁷⁸ See 25 C.F.R. § 83.5(e).

¹⁷⁹ See, e.g., Barry T. Hill, Comments Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *More Consistent and Timely Tribal Recognition Process Needed* (Feb. 7, 2002) (noting it could take more than fifteen years to resolve all currently completed petitions).

¹⁸⁰ Stephen Magagnini, *California's Lost Tribes*, SACRAMENTO BEE (July 1, 1997), available at http://www.sacbee.com/static/archive/news/projects/native/day3_main.html.

¹⁸¹ The Gabrielino-Tongva tribe was ruled a federal common law tribe by the Los Angeles Superior Court in *Dunlap v. Morales*, No. BC-280605 (Cal. Super. Ct. County of L.A. Sept. 22, 2003).

territory.”¹⁸² Federal common law recognition means that the tribe is recognized as a sovereign tribal entity for limited purposes,¹⁸³ such as whether a particular court has jurisdiction over the tribe. However, federal common law tribes do not receive the full range of benefits that accrue with formal recognition by the BIA, including the right to conduct Class III gaming under federal law.¹⁸⁴ While federal common law tribal status provides yet another indication of the strong evidence underlying a tribes’ fight for federal recognition and another sign of a tribes’ government structure, such recognition falls far short of the measures needed to foster self-sufficiency.

An innovative case is currently being tried that offered the possibility of expanding the role of judicial recognition. As noted above, in *New York v. Shinnecock Indian Nation*,¹⁸⁵ Judge Platt stayed a case that had been brought to enjoin the state recognized Shinnecock tribe from building a tribal casino, pending the BIA’s determination of the tribe’s federal status. After the BIA admitted

¹⁸² *Montoya v. United States*, 180 U.S. 261, 266 (1901).

¹⁸³ *See, e.g., Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 315 Mont. 510 (2003). In *Koke*, Montana’s Supreme Court applied the test for federal common law recognition to determine whether a non-federally recognized tribe was sovereign: if yes, then Montana’s state courts would have no authority to adjudicate the case’s underlying issues. The *Koke* court distinguished between the two types of recognition: “Although [the tribe] hasn’t yet received federal recognition, tribes may still be recognized as such under common law.” *Koke*, 315 Mont. at 513. There, the tribe was ultimately recognized as a federal common law sovereign, even though it was not recognized by the Secretary of the Interior as a tribe for the purpose of receiving federal recognition benefits. *See id.*

¹⁸⁴ *Montoya*, 180 U.S. at 266. *See also* 25 C.F.R. § 83.12 (explaining the rights and responsibilities that attend formal recognition).

¹⁸⁵ 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

that it could not meet the court's 18-month deadline, and in recognition of the more than 25 years the tribe has already waited for federal recognition, the court joined the United States as an "involuntary plaintiff" and declared it might determine itself whether the tribe had to be "acknowledged" as meeting the requirements for formal federal recognition.¹⁸⁶ In May 2005, however, the government's motion to be dismissed as a party was granted by the court. Consequently, this path to federal recognition remains untested; even if Judge Platt had taken it upon himself to recognize the tribe through the judiciary, such an act would have been challenged; those unhappy with the decision would have argued that the court exceeded its powers and usurped the right of the executive branch to acknowledge Indian tribes. The separation of powers argument and the normal appellate process would have prevented resolution for quite some time.

3. *Gaming By State Recognized Tribes Respects State and Tribal Sovereignty*

Finally, permitting states and state recognized tribes to enter into gaming agreements would honor both state and tribal sovereignty, concordant with modern notions of federalism as well as the time-honored federal policy favoring tribal independence. Congress's express purpose for regulating the tribal gaming industry has been to promote "tribal economic development, self-

¹⁸⁶ See Ann Givens, *Shinnecock Case Could Set National Precedent*, Newsday (Jan. 26, 2004), available at <http://www.shinnecocknation.com/news/news74.aspx> (last visited March 22, 2004) (discussing the potential role of the judiciary in the federal recognition process of the Shinnecock Tribe); see also Michael Colello, *Shinnecock Trial Begins in Spring*, The East Hampton Independent (Jan. 27, 2004), available at <http://www.shinnecocknation.com/news/news75.aspx> (last visited March 22, 2004) (noting a trial to decide whether the tribe should be granted federal recognition status was likely to start in April 2004). As of June 2005, a determination of the tribe's federal status was still unresolved. See generally Shinnecock Indian Nation Website, <http://www.shinnecocknation.com> (last visited June 13, 2005).

sufficiency, and strong tribal governments.”¹⁸⁷ As asserted in IGRA’s legislative history, “for those tribes that have entered into the business of [gaming], the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.”¹⁸⁸ The recognition of gaming rights in federally recognized tribes has meant increased autonomy for hundreds of tribal governments. It is time for a greater recognition of state authority to recognize tribes, and to allow that authority to address local conditions. Self-sufficiency should be within reach of not only federally recognized tribes, but those few that have earned the respect and recognition of the various states.

CONCLUSION FIVE: Significant policy arguments, consistent with IGRA policies to support the economic well-being of federal tribes, also support gaming by state-recognized tribes under state law.

IV. Summary

Ultimately, in our federalist system, state tribes and the states that recognize them should have the right to decide whether to conduct gaming activities on state-dominion land, including state Indian reservations, under state law. Recognizing state and tribal authority to reach an agreement without the sanction of federal involvement would enable state governments and the tribes they recognize to generate revenue for economic stability and diversification. State power, as originally envisioned by the federalist system, would be revived. Additionally, recognizing the validity of state tribal gaming concords with Congress’s goal of promoting stronger tribal

¹⁸⁷ *Artichoke Joe’s II*, 353 F.3d at 715.

¹⁸⁸ See S. Rep. No. 446, at 2-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072 (additional views of John McCain).

governments and increased tribal self-sufficiency. By recognizing that states have the right to authorize state tribal gaming to *bona fide* tribes within their borders, important notions of federalism and sovereignty will be advanced, ensuring our nation's most disregarded tribal governments are no longer lost in the shuffle.